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PRESERVING THE AUTONOMY AND FUNCTION OF THE GRAND JURY: *UNITED STATES v. WILLIAMS*

The Fifth Amendment to the United States Constitution¹ guarantees an individual the right to indictment² by a grand jury prior to trial for all capital or other infamous crimes.³ The Framers of the Constitution intended the grand jury to serve the dual function of bringing to trial those

1. U.S. CONST. amend. V. The Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury." *Id.* The Fifth Amendment right to indictment by a grand jury applies to federal, not state, criminal proceedings. In *Hurtado v. California*, 110 U.S. 516 (1884), the United States Supreme Court upheld a California murder prosecution commenced by a prosecutor's information. In so doing, the Court declined to incorporate the grand jury requirement into the due process clause of the Fourteenth Amendment. *Id.* at 538. Thus, the states are free to initiate criminal proceedings by other methods. See FRANK B. LATHAM, *AMERICAN JUSTICE ON TRIAL* 49-51 (1972); James R. Acker, *The Grand Jury and Capital Punishment: Rethinking the Role of an Ancient Institution Under the Modern Jurisprudence of Death*, 21 PAC. L.J. 31, 50-56, 59 (1989) (criticizing the reasoning of *Hurtado* and suggesting that individuals accused of capital crimes in state court be guaranteed the right to grand jury indictment in order to protect against the arbitrary exercise of prosecutorial discretion); Lewis P. Watts, Jr., *Grand Jury: Sleeping Watchdog or Expensive Antique?*, 37 N.C. L. REV. 290, 294 (1959).

2. An indictment is a statement returned by the grand jury that sets forth the basic elements of the offense charged and is signed by the prosecutor. FED. R. CRIM. P. 7(c). An indictment satisfies the Sixth Amendment requirement that an accused be informed of the charges against him. U.S. CONST. amend. VI; see *Russell v. United States*, 369 U.S. 749, 763-68 (1962). An indictment constitutes no evidence of guilt. See *United States v. Ciambrone*, 601 F.2d 616, 622 (2d Cir. 1979). A defendant may waive the right to a grand jury indictment for any crime not punishable by death. FED. R. CRIM. P. (7)(b).

The government may prosecute defendants for minor federal crimes and misdemeanors by filing an information. FED. R. CRIM. P. 7(a); see *Duke v. United States*, 301 U.S. 492, 495 (1937) (holding that prosecution for misdemeanor not punishable by more than one year in prison may be initiated by information). An information is a concise written statement made by a prosecutor without leave of court charging a defendant with criminal conduct. FED. R. CRIM. P. 7(a); see PAUL S. DIAMOND, *FEDERAL GRAND JURY PRACTICE & PROCEDURE* 77 (1991); Beauchamp E. Brogan, Note, *Criminal Procedure—Should the Grand Jury System Be Abolished?*, 45 KY. L.J. 151, 158 (1956) (criticizing the grand jury process of indictment and proposing that an information is the "better method" to institute criminal charges); see also *infra* note 81 and accompanying text.

3. U.S. CONST. amend. V. An "otherwise infamous crime" is any crime punishable by more than one year's imprisonment. FED. R. CRIM. P. 7(a); see *Ex parte Wilson*, 114 U.S. 417, 429 (1885); *United States v. Russell*, 585 F.2d 368, 370 (8th Cir. 1978).

rightly accused and protecting the innocent from unjust prosecution.⁴ Despite the fact that the grand jury has long been a cornerstone of Anglo-American criminal jurisprudence,⁵ it has recently suffered increasingly sharp attacks on its legitimacy.⁶ Scholars suggest that the growing complexity of crime and the ascending role of the prosecutor⁷ have rendered the grand jury a victim of prosecutorial abuse and manipulation.⁸

4. *Branzburg v. Hayes*, 408 U.S. 665, 687-90 (1972). The grand jury fulfills its protective function by permitting the government to prosecute an accused only after a grand jury has found it probable that a crime has been committed and that the accused committed the crime. *United States v. Calandra*, 414 U.S. 338, 343 (1974).

In *Wood v. Georgia*, 370 U.S. 375 (1962), Chief Justice Warren noted:

Historically, this body [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will.

Id. at 390; see also *Bracy v. United States*, 435 U.S. 1301, 1302 (1978) (stating the purpose of the grand jury to be determining whether probable cause exists to bring an accused to trial); *United States v. DiGrazia*, 213 F. Supp. 232, 235 (N.D. Ill. 1963) ("The Grand Jury exists as an integral part of Anglo-American jurisprudence for the express purpose of assuring that persons will not be charged with crimes simply because of the zeal, malice, partiality or other prejudice of the prosecutor, the government or private persons").

5. See *infra* notes 66-111 and accompanying text.

6. See *Brogan, supra* note 2, at 154-60; *infra* notes 7-9 and accompanying text.

7. See *United States v. Linton*, 502 F. Supp. 861, 865 (D. Nev. 1980) (stating that "[t]he passive role of the modern grand jury is perhaps an inevitable function of our complex urban society. Nevertheless, at its best the grand jury is capable of acting as something more than a rubber stamp." (quoting 8 JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* ¶ 6.02[1], at 6-12 (1976))); *United States v. Kleen Laundry & Cleaners, Inc.*, 381 F. Supp. 519, 521 (E.D.N.Y. 1974) ("Today the grand jury's independence in the criminal justice system has declined with the increasing complexity of crime and the growth of the role of prosecutors, professional police and investigative forces."); Roger T. Brice, Comment, *Grand Jury Proceedings: The Prosecutor, the Trial Judge, and Undue Influence*, 39 U. CHI. L. REV. 761, 764 (1972) (asserting that although the grand jury's reliance upon professional investigatory agencies and the prosecutor to gather evidence "has increased efficiency in investigation and decision making. . . . [I]t has made the modern grand jury a generally more passive instrument than its precursors." (footnote omitted)).

8. *United States v. Dionisio*, 410 U.S. 1 (1973). In *Dionisio*, the majority acknowledged that "[t]he grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor." *Id.* at 17. Echoing the majority in *Dionisio*, Justice Douglas stated in *United States v. Mara*, 410 U.S. 19 (1973), that "[i]t is, indeed, common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive." *Id.* at 23 (Douglas, J., dissenting). Justice Douglas quoted approvingly Judge Campbell's statement that "[a]ny experienced prosecutor will admit that he can indict anybody at anytime for almost anything before any grand jury." *Id.* (quoting William J. Campbell, *Delays in Criminal Cases*, 55 F.R.D. 229, 253 (1972)).

One commentator, discussing the erosion of the grand jury's protective function, noted that

Although some critics have called for the abolition of the grand jury,⁹

the concern of protecting the individual from wrongful prosecution is one about which grand juries in general show little interest. It is edifying indeed to a new prosecutor to learn how willing people are to let trouble descend upon their fellows. In positions of authority, many are prepossessed by fancied obligations to "back up" the police, to stop "mollicoddling," to "set examples." Attitudes of understanding, of patient inquiry, of skeptical deliberation, so needed in the service of justice, recede in the presence of duly constituted officials and are replaced by a passive acceptance of almost anything which seems to bear the sovereign's seal of approval.

Melvin P. Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A. J. 153, 154-55 (1965); see also LEWIS KATZ ET AL., JUSTICE IS THE CRIME: PRETRIAL DELAY IN FELONY CASES 48, 121 (1972) (stating that the grand jury is "a rubber stamp for the prosecutor"); Ovio C. Lewis, *The Grand Jury: A Critical Evaluation*, 13 AKRON L. REV. 33, 57 (1979) (stating that the grand jury is "the prosecutor's darling"); Wayne L. Morse, *A Survey of the Grand Jury System (Part II)*, 10 OR. L. REV. 217, 329 (1931) (stating that grand juries "are likely to be a fifth wheel in the administration of criminal justice in that they tend to stamp with approval, and often uncritically, the wishes of the prosecuting attorney"); Thomas P. Sullivan & Robert D. Nachman, *If It Ain't Broke, Don't Fix It: Why the Grand Jury's Accusatory Function Should Not Be Changed*, 75 J. CRIM. L. & CRIMINOLOGY 1047, 1050 (1984) ("When a federal prosecutor seeks an indictment from the grand jury, almost invariably the grand jury returns a true bill. Indeed, 'no bills' are so rare that prosecutors regard them as freak occurrences." (footnote omitted)); Peter F. Vaira, *The Role of the Prosecutor Inside the Grand Jury Room: Where Is the Foul Line?*, 75 J. CRIM. L. & CRIMINOLOGY 1129, 1129 (1984) (stating that the grand jury has been described as "no longer being an independent body"). But see W. Wilson White, *In Defense of the Grand Jury*, 25 PA. B. ASS'N Q. 260, 262, 264 (1954) (defending the legitimacy and necessity of the grand jury).

9. See, e.g., NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 36-37 (1931) (finding that because the grand jury system "wastes money, time, and energy," it should be "done away with" and only occasionally used "as a general investigating body" to inquire into official misconduct or "large conspiracies") [hereinafter REPORT ON PROSECUTION]; Antell, *supra* note 8, at 155 (arguing that the grand jury should be abolished because it is archaic and a potential oppressor); William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 178-79 (1973) (arguing that the grand jury is the "alter ego of the prosecutor," no longer serves a protective function, and should be abolished by constitutional amendment); George Lawyer, *Should the Grand Jury System Be Abolished?*, 15 YALE L.J. 178, 187 (1906) (stating that "all crimes may safely be instituted before an examining court, and that the presentment and indictment of the grand jury are no longer necessary either to a prompt or to a certain and safe administration of justice"); Lewis, *supra* note 8, at 34, 41 (arguing that "there is no better reason for the continuation of a practice [indictment by grand jury] detrimental to the rights of the individual than that it existed in the time of Henry II. . . . Accordingly, the only rational course of action requires abolition of [the grand jury]"); Richard D. Younger, *The Grand Jury Under Attack*, 46 J. CRIM. L. & CRIMINOLOGY 26 (1955) (surveying efforts in England and America to abolish the grand jury).

In the early 1800s, Jeremy Bentham and Robert Peel were the first to criticize the English grand jury. They argued that the grand jury was corrupt, inefficient, and a tool of the wealthy. See 2 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 139-40, 171 (John Bowring ed., 1962); see also RICHARD D. YOUNGER, THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES, 1634-1941, at 56-57 (1963). Although Parliament's efforts in 1834 and 1836 to restrict the use of grand juries failed, a strong movement to totally abolish the grand jury in England began by the mid-nineteenth century. See YOUNGER, *supra*, at

others have suggested procedural reforms to curb grand jury abuse and restore fairness to its determinations of probable cause.¹⁰ One such suggested reform calls for the prosecutor to disclose to the grand jury substantial exculpatory evidence¹¹ in his possession.¹² The legality of es-

57; Nathan T. Elliff, *Notes on the Abolition of the English Grand Jury*, 29 J. CRIM. L. & CRIMINOLOGY 3, 4-14 (1938) (presenting criticisms of the English grand jury and the events culminating in its abolition); James P. Whyte, *Is the Grand Jury Necessary?*, 45 VA. L. REV. 461, 483 (1959). Parliament suspended grand jury proceedings in March 1917 because of World War I. Elliff, *supra*, at 15; W.J. Heyting, *The Abolition of Grand Juries in England*, 19 A.B.A. J. 648 (1933). After the War, the House of Lords defeated by a vote of 184 to 149 a proposal in the Criminal Justice Bill of 1925 to abolish the grand jury. Elliff, *supra*, at 19; Albert Lieck, *Abolition of the Grand Jury in England*, 25 J. CRIM. L. & CRIMINOLOGY 623, 624 (1935). England finally abolished the grand jury, except for limited circumstances, by the Administration of Justice (Miscellaneous Provisions) Act of 1933. Elliff, *supra*, at 20-21; Lieck, *supra*, at 624. Proponents of the 1933 Act rejected arguments that the English grand jury protected individuals from state oppression and asserted that in light of the rigorous preliminary examination of cases by justices, the subsequent screening of the same cases by grand juries was unnecessary and too costly. Heyting, *supra*, at 649. The grand jury in England was completely abolished by the Criminal Justice Act of 1948. Acker, *supra* note 1, at 51 n.102.

Reflecting upon England's eradication of its grand jury system, Albert Lieck commented:

The grand jury had long lagged superfluous on a stage where it had once played a great part. Its performance had grown perfunctory, and its service a burden to reluctant actors. During its last years it was kept in being only by that strong sentiment among lawyers which resents change however salutary; but, though the English people is [sic] patient, there is a certain vein of commonsense in its make-up, which, in the long run, prevails.

Lieck, *supra*, at 623.

10. See *The Grand Jury Reform Act of 1978: Hearings on S. 3405 Before the Subcomm. on Administration, Practice and Procedure of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 154 (1978); *Grand Jury Reform: Hearings on H.R. 94 Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 484 (1977); Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463 (1980); Richard E. Gerstein & Laurie O. Robinson, *Remedy for the Grand Jury: Retain but Reform*, 64 A.B.A. J. 337 (1978).

11. "Substantial exculpatory evidence" has been defined as "evidence that clearly negates guilt and that would change a grand jury's decision to charge a defendant with a crime." *United States v. Gressett*, 773 F. Supp. 270, 276 (D. Kan. 1991) (citing *United States v. Reid*, 911 F.2d 1456, 1460 (10th Cir. 1990), cert. denied, 498 U.S. 1097 (1991)).

12. Several manuals for the guidance of prosecutors indicate that prosecutors should reveal exculpatory evidence to grand juries. The United States Department of Justice Manual, for instance, states:

Although neither statutory nor case law imposes upon the prosecutor a legal obligation to present exculpatory evidence to the grand jury, it is the Department's internal policy to do so under many circumstances. For example, when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person.

tablishing this particular reform by judicial fiat remained unsettled until the United States Supreme Court ruled in *United States v. Williams*¹³ that the imposition of this prosecutorial duty by federal courts was an improper exercise of the courts' supervisory power.¹⁴

Prior to *Williams*, the federal courts of appeals were split regarding the duty of a prosecutor to disclose exculpatory evidence to a grand jury.¹⁵ The majority of federal circuits imposed no such duty.¹⁶ These courts reasoned that since the proper setting for determining an accused's guilt

7 UNITED STATES DEPARTMENT OF JUSTICE MANUAL 9-11.233 (1992) (citations omitted); see also MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(d) (1992) ("In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse."); NATIONAL DISTRICT ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS § 60.2 (1991) ("In his capacity as advisor [to the grand jury], the prosecutor may appropriately explain the law and express his opinion on the legal significance of the evidence but should give due deference to the grand jury's status as an independent legal body."); STANDARDS FOR CRIMINAL JUSTICE Standard 3-3.6 (1992) ("No prosecutor should knowingly fail to disclose to the grand jury evidence which tends to negate guilt or mitigate the offense.").

The American Bar Association (ABA), moreover, has drafted a model act of which section 101, entitled *Prosecutor's Duty to Reveal Exculpatory Evidence to the Grand Jury*, provides:

1. If the prosecutor is aware of exculpatory evidence, that is, evidence which, if believed, tends to negate one of the material elements of the crime, he must disclose and if feasible present such evidence to the grand jury.
2. If the prosecutor is aware of exculpatory evidence which bears upon a possible affirmative defense that, if believed, raises a reasonable doubt about the defendant's guilt, he should alert the grand jury to its existence and inform them of their right to call for such evidence.

A.B.A. Grand Jury Policy and Model Act § 101 (1982).

13. 112 S. Ct. 1735 (1992).

14. *Id.* at 1746.

15. See *infra* notes 16-25 and accompanying text.

16. See, e.g., *United States v. Hawkins*, 765 F.2d 1482, 1488 (11th Cir. 1985) (finding that a prosecutor "is not obligated to present exculpatory evidence to a grand jury"), *cert. denied*, 474 U.S. 1103 (1986); *United States v. Adamo*, 742 F.2d 927, 936 (6th Cir. 1984) (same), *cert. denied*, 469 U.S. 1193 (1985); *United States v. Sears, Roebuck & Co.*, 719 F.2d 1386, 1394 (9th Cir. 1983) (same), *cert. denied*, 465 U.S. 1079 (1984); *United States v. Leverage Funding Sys., Inc.*, 637 F.2d 645, 648 (9th Cir. 1980) (same), *cert. denied*, 452 U.S. 961 (1981); *United States v. Y. Hata & Co.*, 535 F.2d 508, 512 (9th Cir.) (same), *cert. denied*, 429 U.S. 828 (1976); *United States v. Ruyle*, 524 F.2d 1133, 1135-36 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976). See also *supra* note 28 (regarding prosecutorial disclosure rule in Courts of Appeals for the First and Eighth Circuits). The accused had no right to testify before the grand jury considering his indictment, and had no right to cross-examine witnesses or introduce evidence in his defense. See *United States v. Ciambrone*, 601 F.2d 616, 622-23 (2d Cir. 1979); see also MARVIN E. FRANKEL & GARY P. NAFTALIS, *THE GRAND JURY: AN INSTITUTION ON TRIAL* 30 (1977); Mark E. Cavanagh, Note, *Grand Jury: A Prosecutor Need Not Present Exculpatory Evidence*, 38 WASH. & LEE L. REV. 110, 113 (1981); Note, *The Prosecutor's Duty to Present Exculpatory Evidence to an Indicting Grand Jury*, 75 MICH. L. REV. 1514, 1516 (1977).

or innocence is the trial,¹⁷ requiring the prosecutor to present exculpatory evidence at the pretrial stage¹⁸ would convert the grand jury proceedings from a determination of probable cause to a preliminary trial on the merits.¹⁹ In addition, these courts considered the task of identifying what evidence is exculpatory to be unreasonably difficult.²⁰

Within the past fifteen years, however, the United States Courts

17. See, e.g., *Silverthorne v. United States*, 400 F.2d 627, 634 (9th Cir. 1968) (stating that "the greatest safeguard to the liberty of the accused is the petit jury and the rules governing its determination of a defendant's guilt or innocence").

18. The Supreme Court has recognized that the prosecution's failure to disclose evidence favorable to the defendant upon his request or motion at trial is a violation of due process. The rule applies where the exculpatory evidence is material to the defendant's guilt or innocence, regardless of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (finding defendant's Fourteenth Amendment due process rights were violated in a State trial for murder where the Government failed to disclose a statement made by an accomplice in which the accomplice admitted to committing the homicide).

In *United States v. Agurs*, 427 U.S. 97 (1976), the Court held that the Fifth and Fourteenth Amendments require the Government to volunteer exculpatory evidence at trial if such evidence would create a reasonable doubt as to the guilt of the accused. *Id.* at 112-13. In *Agurs*, the Court found that the Government's failure to present defense counsel with defendant's criminal record did not violate defendant's due process rights, where the defense did not request the evidence and the trial judge remained convinced of defendant's guilt beyond a reasonable doubt after considering the record in light of the other evidence. *Id.* at 114; see also *United States v. Bagley*, 473 U.S. 667, 685 (1985) (holding that the failure to disclose impeachment evidence to the defense violates due process if the evidence would have affected the outcome of the trial); *California v. Trombetta* 467 U.S. 479, 484 (1984); *Giglio v. United States*, 405 U.S. 150, 154-55 (1972) (finding that the defendant's due process rights were violated where the Government failed to disclose after trial that it promised not to prosecute a coconspirator if he testified for the Government).

19. See, e.g., *United States v. Calandra*, 414 U.S. 338, 349 (1974); *United States v. Dionisio*, 410 U.S. 1, 17-18 (1973); *United States v. Costello*, 350 U.S. 359, 363 (1956).

20. See, e.g., *United States v. Mandel*, 415 F. Supp. 1033, 1041-42 (D. Md. 1976) (stating that by requiring a prosecutor to disclose exculpatory evidence to a grand jury "a court runs the risk of interfering too much with the grand jury process and does so largely on the basis of guessing what evidence a grand jury might have found persuasive"). But see *United States v. Dorfman*, 532 F. Supp. 1118, 1133 (N.D. Ill. 1981) (stating that requiring the prosecutor to present to a grand jury "evidence which clearly negates the target's guilt. . . . [S]hould eliminate most of the problems involved with having to determine what might be considered exculpatory in the abstract, while still not permitting prosecutors to undermine completely the grand jury's function as a check on prosecutorial power.").

of Appeals for the Second,²¹ Seventh,²² and Tenth²³ Cir-

21. See *United States v. Ciambrone*, 601 F.2d 616 (2d Cir. 1979). The United States Court of Appeals for the Second Circuit was the first federal court of appeals to recognize such a duty. In *Ciambrone*, the defendant sought dismissal of an indictment charging him with perjury allegedly committed while testifying as a witness in a previous case. *Id.* at 618. Ciambrone argued that in response to grand juror questioning the prosecutor did not reveal that he had been coerced by threats against his life into giving the alleged false testimony. *Id.* Writing for the majority, Judge Mansfield reasoned that "the prosecutor's right to exercise some discretion and selectivity in the presentation of evidence to a grand jury does not entitle him to mislead it or to engage in fundamentally unfair tactics before it." *Id.* at 623. Thus, the *Ciambrone* court held that in the "interest of justice," a prosecutor should present "any substantial evidence negating guilt . . . where it might reasonably be expected to lead the jury not to indict." *Id.*; see also *United States v. Casamento*, 887 F.2d 1141, 1183 (2d Cir. 1989) ("The prosecutor should present exculpatory evidence where such evidence is 'substantial' and 'where it might reasonably be expected to lead the jury not to indict.'" (quoting *Ciambrone*, 601 F.2d at 623)), *cert. denied*, 493 U.S. 1081 (1990).

22. See *United States v. Flomenhoft*, 714 F.2d 708, 712 (7th Cir. 1983), *cert. denied*, 465 U.S. 1068 (1984).

In October 1981, Howard C. Flomenhoft was indicted by a federal grand jury for mail fraud. *Id.* at 710. Flomenhoft moved the United States District Court for the Northern District of Indiana to dismiss the indictment because the government failed to disclose to the grand jury exculpatory evidence in its possession. *Id.* Although the district court denied the defendant's motion, the Government stated that it would seek a superceeding indictment against Flomenhoft to include two new tax charges and to cure any defects in the first grand jury proceeding. *Id.* In its presentation to the grand jury, the Government revealed the record of the first grand jury proceeding, the alleged exculpatory evidence excluded from the first grand jury proceeding, and transcripts of testimony from ten witnesses. *Id.* at 711. When the second grand jury indicted him, Flomenhoft challenged the indictment on the grounds that he was never indicted by an "independent and informed" grand jury since the Government did not present the alleged exculpatory evidence to the first grand jury, the second grand jury was composed of individuals who did not serve on the first grand jury, and the Government failed to call the ten witnesses to testify live before the second grand jury. *Id.* Citing the rule enunciated in *United States v. Dorfman*, 532 F. Supp. 1118, 1133 (N.D. Ill. 1981), that prosecutors "must present evidence which clearly negates the target's guilt," the Court of Appeals for the Seventh Circuit found the second indictment to be valid because "all the exculpatory evidence was presented to the grand jury." *Id.* at 712; see also *In re Special Apr. 1977 Grand Jury*, 587 F.2d 889, 893 (7th Cir. 1978) (noting that United States Attorney's manual directs federal prosecutors "to present to the grand jury 'substantial evidence which directly negates the inference of the subject's guilt'").

23. In *United States v. Page*, 808 F.2d 723 (10th Cir.), *cert. denied*, 482 U.S. 918 (1987), Ralph G. Thompson was indicted and convicted in the United States District Court for the Western District of Oklahoma for racketeering and extortion. He appealed to the United States Court of Appeals for the Tenth Circuit on the grounds that the Government did not present to the grand jury evidence that would have exonerated him. *Id.* at 726. The Tenth Circuit stated that the prosecutor "is not obliged to ferret out and present every bit of potentially exculpatory evidence," *id.* at 728, but that in the interest of "judicial economy," the Government must reveal "substantial exculpatory evidence" if it is "discovered in the course of an investigation." *Id.* The court reasoned that "[i]f a fully informed grand jury cannot find probable cause to indict, there is little chance the prosecution could have proved guilt beyond a reasonable doubt to a fully informed petit jury." *Id.* The *Page* court, however, did not dismiss the indictment because it found the evidence insufficient to meet the "clearly exculpatory" standard. *Id.*; see also *United States v. Reid*, 911 F.2d

cuits,²⁴ as well as several federal district courts²⁵ and numerous state

1456, 1460 (10th Cir. 1990) (stating that "although a prosecutor need not present all conceivably exculpatory evidence to the grand jury, it must present evidence that clearly negates guilt" (quoting *Page*, 808 F.2d at 727)), *cert. denied*, 498 U.S. 1097 (1991).

24. The United States Court of Appeals for the Third Circuit has not decided the issue of whether such a duty exists. Several district courts within the Third Circuit have held, however, that "when a prosecutor is aware of substantial exculpatory evidence, the evidence should be disclosed to the grand jury if it could reasonably cause the grand jury not to indict." *United States v. Cole*, 717 F. Supp. 309, 314 (E.D. Pa. 1989) (citing *United States v. Litman*, 547 F. Supp. 645, 649 (W.D. Pa. 1982), *aff'd without op. sub nom. United States v. Spanjol*, 958 F.2d 365 (3d Cir. 1992); *see also United States v. Fisher*, 692 F. Supp. 495, 504 (E.D. Pa. 1988) (noting that the Third Circuit has not yet determined the duty of the prosecutor to disclose exculpatory evidence to the grand jury), *appeal denied*, 871 F.2d 444 (3d Cir. 1989); *New Jersey ex rel. Kudisch v. Overbeck*, 618 F. Supp. 196, 199 (D.N.J. 1985) (citing conflicting authority regarding the prosecutor's duty to disclose exculpatory evidence), *rev'd on other grounds*, 800 F.2d 1139 (3d Cir. 1986).

The First and Eighth Circuits have both held that a "prosecutor is normally not under a duty to disclose exculpatory evidence to the grand jury," suggesting that extraordinary circumstances may arise where it would be appropriate to impose such a prosecutorial obligation. *United States v. Wilson*, 798 F.2d 509, 517 (1st Cir. 1986); *see, e.g., United States v. Vincent*, 901 F.2d 97, 99 (8th Cir. 1990) (stating that a prosecutor is "normally not under a duty to disclose exculpatory evidence to the grand jury" (quoting *United States v. Bucci*, 839 F.2d 825, 831 (1st Cir.), *cert. denied*, 488 U.S. 844 (1988)); *United States v. Rivera-Santiago*, 872 F.2d 1073, 1087 (1st Cir.) (same), *cert. denied*, 492 U.S. 910 (1989); *United States v. Civella*, 666 F.2d 1122, 1127 (8th Cir. 1981) (same).

25. *See, e.g., United States v. Short*, 777 F. Supp. 40, 42 (D.D.C. 1991) (dismissing an indictment charging the defendant with possession of cocaine with intent to distribute where the Government withheld from the grand jury part of codefendant's statement in which codefendant accepted total responsibility for alleged drug transaction); *United States v. Gressett*, 773 F. Supp. 270, 276 (D. Kan. 1991) (stating that a prosecutor must "reveal known, substantially exculpatory evidence to the grand jury"); *United States v. Law Firm of Zimmerman & Schwartz, P.C.*, 738 F. Supp. 407, 411 (D. Colo. 1990) (same), *rev'd on other grounds sub nom. United States v. Brown*, 943 F.2d 1246 (10th Cir. 1991); *United States v. Dyer*, 750 F. Supp. 1278, 1300 (E.D. Va. 1990) (stating that "a failure to present evidence that directly negates a target's guilt constitutes grand jury abuse"); *Cole*, 717 F. Supp. at 314 (stating that a prosecutor must present "substantial exculpatory evidence . . . if it could reasonably cause the grand jury not to indict"); *United States v. Giovannelli*, 747 F. Supp. 875, 883 (S.D.N.Y. 1989) (stating that the prosecutor "is not required to highlight every piece of potentially exculpatory evidence . . . as long as the prosecutor does not dupe the grand jury or engage in unfair tactics before it"); *United States v. Recognition Equip., Inc.*, 711 F. Supp. 1, 12 (D.D.C. 1989) (stating that a prosecutor may not "hide evidence that clearly negates guilt" from the grand jury); *James v. Kelly*, 648 F. Supp. 397, 403 (E.D.N.Y. 1986) (same); *United States v. Gavran*, 620 F. Supp. 1277, 1280 (E.D. Wis. 1985), *aff'd without op.*, 845 F.2d 1023 (7th Cir. 1988) (same); *Kudisch*, 618 F. Supp. at 199 (same); *Dorfman*, 532 F. Supp. at 1133 (same); *United States v. Lawson*, 502 F. Supp. 158, 172 (D. Md. 1980) (dismissing an indictment without prejudice where the prosecutor "intentionally and repeatedly" asked misleading questions and failed "to disclose known, exculpatory evidence" to the grand jury); *United States v. Linton*, 502 F. Supp. 861, 868 (D. Nev. 1980) (stating that a prosecutor must present to the grand jury evidence that "clearly negates" guilt); *United States v. Gold*, 470 F. Supp. 1336, 1353 (N.D. Ill. 1979) (stating that a prosecutor must present to the grand jury "exculpatory" evidence); *United States v. Olin Corp.*, 465 F. Supp. 1120, 1127 (W.D.N.Y. 1979) (stating that a prosecutor must present to the grand jury evidence which "clearly negates guilt"); *United States*

courts,²⁶ have required the prosecutor to present exculpatory evidence to a grand jury. These courts asserted that a prosecutor's concealment of

v. Phillips Petroleum Co., 435 F. Supp. 610, 619-20 (N.D. Okla. 1977) (dismissing on due process and supervisory power grounds an indictment charging defendants with tax fraud where the prosecutor examined two witnesses after grand jury was excused for the day and failed to present exculpatory evidence revealed in those examinations to the grand jury); United States v. Mandel, 415 F. Supp. 1033, 1042 (D. Md. 1976) (stating that a prosecutor should disclose evidence to grand jury that "clearly would have negated" guilt or where failure to disclose such evidence "undermined the authority of the grand jury to act"); United States v. DeMarco, 401 F. Supp. 505, 513 (C.D. Cal. 1975) (dismissing an indictment pursuant to supervisory power and on Fifth Amendment due process grounds because the prosecutor failed to reveal to the grand jury that "the charge could be attacked as an unjustifiable exercise of the charging power"), *aff'd on other grounds*, 550 F.2d 1224 (9th Cir.), *cert. denied*, 434 U.S. 827 (1977).

26. At least fifteen jurisdictions, either by statute or case law, also require a prosecutor to present exculpatory evidence to the grand jury. NEV. REV. STAT. ANN. § 172.145(2) (Michie 1992) ("If the district attorney is aware of any evidence which will explain away the charge, he shall submit it to the grand jury."); N.M. STAT. ANN. § 31-6-11(b) (Michie 1978) ("The prosecuting attorney assisting the grand jury shall present evidence that directly negates the guilt of the target where he is aware of such evidence."); OKLA. STAT. ANN. tit. 22 § 335 (West 1992) ("The grand jurors, upon request of the accused, shall, and on their own motions may, hear the evidence for the accused."); OR. REV. STAT. § 132.320(4) (1991); Nelson v. State, 628 P.2d 884, 887 (Alaska 1981); Frink v. State, 597 P.2d 154, 164 (Alaska 1979) (stating that a prosecutor must "present exculpatory evidence to the grand jury" because "[t]he grand jury cannot fulfill . . . [its protective] function unless it hears evidence tending to refute, as well as establish, guilt"); State v. Coconino County Sup. Ct., 678 P.2d 1386, 1389 (Ariz. 1984) (stating that a prosecutor must present "clearly exculpatory" evidence to the grand jury); Johnson v. Superior Ct., 539 P.2d 792, 796 (Cal. 1975) (stating that the prosecutor must present to the grand jury "evidence reasonably tending to negate guilt"); State v. Couture, 482 A.2d 300, 315 (Conn. 1984) (stating that the prosecutor must present to the grand jury "any substantial evidence that would negate the accused's guilt"), *cert. denied*, 469 U.S. 1192 (1985); Miles v. United States, 483 A.2d 649, 655 (D.C. 1984) (same); State v. Adams, 645 P.2d 308, 311 (Haw. 1982) (stating that the prosecutor must present "clearly exculpatory" evidence to the grand jury); State v. O'Daniel, 616 P.2d 1383, 1387 (Haw. 1980) (same); State v. Bell, 589 P.2d 517, 521 (1978) (same); Commonwealth v. Mayfield, 500 N.E.2d 774, 778 (Mass. 1986) (stating that the prosecutor must disclose to the grand jury "known exculpatory evidence that would greatly undermine the credibility of an important witness"); Commonwealth v. Connor, 467 N.E.2d 1340, 1350 (Mass. 1984) (same); State v. Moore, 438 N.W.2d 101, 105 (Minn. 1989) (requiring reversal if the prosecutor fails to present exculpatory evidence that "materially affected the [grand jury] proceeding" (quoting State v. Olkon, 299 N.W.2d 89, 106 (Minn. 1980), *cert. denied*, 499 U.S. 1132 (1981) (alteration in original))); Ostman v. Eighth Judicial Dist. Ct., 816 P.2d 458, 459-60 (Nev. 1991) (issuing a writ of mandamus ordering dismissal of an indictment without prejudice where the prosecutor failed to present exculpatory evidence to grand jury); Sheriff v. Frank, 734 P.2d 1241, 1244 (Nev. 1987) (affirming an order dismissing an indictment because the prosecutor did not present exculpatory evidence to grand jury); Buzbee v. Donnelly, 634 P.2d 1244, 1251 (N.M. 1981); People v. Scott, 568 N.Y.S.2d 857 (N.Y. Sup. Ct. 1991); People v. Abbatiello, 494 N.Y.S.2d 625, 627 (N.Y. Sup. Ct. 1985) (requiring the prosecutor to present exculpatory evidence if it would "materially influence the grand jury's investigation, or . . . possibly cause the grand jury to change its findings"); People v. Monroe, 480 N.Y.S.2d 259, 266 (N.Y. Sup. Ct. 1984) (same); State v. Nordquist, 309 N.W.2d 109, 118 (N.D. 1981); State v. Harwood, 609 P.2d

exculpatory evidence that is material to the grand jury's determination of probable cause undermined the grand jury's ability to be "independent and informed"²⁷ and to act as a check on prosecutorial power.²⁸ Moreover, these courts explained that by withholding such evidence, the prosecutor disregarded his constitutional obligation to pursue fairness and ensure justice is done.²⁹ Finally, the courts noted that a grand jury indictment often has ruinous personal and professional consequences for a defendant that cannot be redressed by a subsequent dismissal or acquittal at trial.³⁰

1312, 1316 (Or. Ct. App. 1980) (stating that the prosecutor must present evidence to the grand jury "which objectively refutes the facts as they appear from the state's evidence"); *Strehl v. District Ct.*, 558 P.2d 597, 598-99 (Utah 1976).

27. *Gold*, 470 F. Supp. at 1353 (stating that a prosecutor "is under legal and ethical obligations" to disclose exculpatory evidence to the grand jury "since the grand jury cannot protect citizens from malicious prosecutions if it is not given information which is material to its determination" of probable cause).

28. *See, e.g., Dorfman*, 532 F. Supp. at 1131 ("If the prosecutor were to conceal probative exculpatory evidence, he would effectively subvert the constitutional function of the grand jury. Its independence and ability to check prosecutorial power would be grossly undermined.").

29. *See, e.g., Dorfman*, 532 F. Supp. at 1133 ("Giving prosecutors untrammelled freedom to pick and choose which evidence they will present to a grand jury would make a mockery of their constitutional duty of fairness, and render the grand jury meaningless as a check on prosecutorial abuse.").

30. *United States v. Serubo*, 604 F.2d 807, 817 (3d Cir. 1979) (stating that "while in theory a trial provides the defendant with a full opportunity to contest and disprove the charges against him, in practice, the handing up of an indictment will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo"). Monroe H. Freedman has written:

Merely to be charged with a crime is a punishing experience. The defendant's reputation is immediately damaged, usually irreparably, despite an ultimate failure to convict. Anguish and anxiety become a daily presence for the defendant, and for the defendant's family and friends. The emotional strains of the criminal trial process have been known to destroy marriages and to cause alienation or emotional disturbance among the accused's children. The financial burden can be enormous, and may well include loss of employment because of absenteeism due to pretrial detention or time required away from work during hearings and the trial, or because of the mere fact of having been named as a criminal defendant. The trial itself, building up to the terrible anxiety during jury deliberations, is a torturing experience.

MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 84 (1975); *see also* FRANK W. MILLER, *PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME* 1 (1969) (highlighting the potential economic and social costs of defending against criminal charges); Lewis, *supra* note 8, at 34, 41 (stating that an indictment is "an ordeal whose cost in terms of money and emotional trauma [can] not [be] cancelled out by a not guilty verdict," and suggesting that "[p]erhaps every prospective grand juror should sit through a trial, and talk with defendants so that he could come to appreciate the onerous nature of the impact of an indictment on the accused"); Brice, *supra* note 7, at 762 ("Whatever the final outcome of [a defendant's] case may be, indictment can cause the accused loss of

In *United States v. Williams*,³¹ the United States District Court for the Northern District of Oklahoma dismissed the indictment of John H. Williams, Jr. because the prosecutor failed to disclose substantial exculpatory evidence to the grand jury that indicted him.³² Williams, an investor who obtained loans from four Oklahoma banks over the period of one year, allegedly provided fraudulent financial information on his loan applications.³³ Each time that Williams requested a loan, he presented each bank with two financial statements.³⁴ On the first statement, Williams listed as "current assets"³⁵ about six million dollars in notes receivable from three venture capital companies.³⁶ The Government considered this statement misleading because Williams knew these companies were newly formed and had a negative net worth.³⁷ On the second statement, Williams listed the interest payments he received on the notes from the companies as an outside and independent source of income.³⁸ The Government alleged that the second statement was misleading because Williams failed to state that these interest payments were made from funds he had personally loaned to the companies.³⁹

Following a six month investigation, Williams was indicted by a federal grand jury for seven counts of bank fraud.⁴⁰ Shortly after arraignment, Williams moved to compel the Government to reveal any exculpatory evidence in its possession.⁴¹ The Government, in response, disclosed an edited copy of the grand jury transcript.⁴² After reviewing the transcript, Williams moved to dismiss the indictment alleging that the Government

employment, lessening of community respect, and an expensive, time-consuming legal battle.").

31. 112 S. Ct. 1735 (1992).

32. *Id.* at 1737.

33. *Id.*

34. *Id.*

35. *Id.* The term "current asset" describes those assets that will be realized as cash within one year. *Id.*

36. *Id.*

37. *United States v. Williams*, 899 F.2d 898, 899 (10th. Cir. 1990), *rev'd*, 112 S. Ct. 1735 (1992).

38. *Williams*, 112 S. Ct. at 1737.

39. *Id.*

40. Williams was charged with violating 18 U.S.C. § 1014 (Supp. III 1991) by knowingly overstating the value of his current assets and interest income "for the purpose of influencing in any way the action [of a federally insured financial institution]." *Williams*, 112 S. Ct. at 1737 (alterations in original) (quoting 18 U.S.C. § 1404).

41. *Williams*, 899 F.2d at 899. The Government was bound by its *Brady* obligation. *Id.*; see, *supra* note 18.

42. *Id.*

failed to fulfill its duty under *United States v. Page*⁴³ to disclose exculpatory evidence in its possession to the grand jury.⁴⁴

The district court initially denied the motion, but on reconsideration,⁴⁵ found that the evidence "‘raise[d a] reasonable doubt about the defendant’s intent to defraud,’ because it ‘indicate[d] a lawful basis for the information provided to the banks.’"⁴⁶ Finding the grand jury’s decision to indict to be "‘gravely suspect,’" the district court dismissed the indictment without prejudice.⁴⁷

Upon the Government’s appeal, the United States Court of Appeals for the Tenth Circuit affirmed the dismissal.⁴⁸ The Tenth Circuit first recognized the duty of a prosecutor to reveal to a grand jury "substantial exculpatory evidence" discovered during an investigation.⁴⁹ The Tenth Circuit then agreed that intent to perpetrate a crime is a determination the grand jury must make when deciding whether to indict, and found that the evidence withheld by the prosecution was relevant to Williams’ intent.⁵⁰ The Tenth Circuit concluded that the district court’s finding that the Government withheld "substantial exculpatory evidence" from the grand jury was not "‘clearly erroneous,’"⁵¹ and that the district court’s dismissal of the indictment without prejudice was not an abuse of its discretion.⁵²

The Supreme Court reversed the Tenth Circuit’s decision.⁵³ Justice Scalia, writing for a majority of five Justices,⁵⁴ indicated that a district court may not "dismiss an otherwise valid indictment because the Government failed to disclose to the grand jury ‘substantial exculpatory evi-

43. 808 F.2d 723, 728 (10th Cir.), *cert. denied*, 482 U.S. 918 (1987); *see supra* note 23.

44. *Williams*, 112 S. Ct. at 1737. Williams moved to dismiss the indictment as suspect because the Government did not present to the grand jury his ledgers, income tax returns, financial statements, or a deposition he had given in a previous bankruptcy proceeding. *Id.* at 1737-38. Williams believed that, because these documents would show that he maintained a consistent manner of accounting and that his financial statements to the banks were not intentionally misleading, the prosecutor should have revealed them to the grand jury pursuant to *Page*. *Id.*

45. *Williams*, 899 F.2d at 899-900.

46. *Id.* at 900 (quoting Record, vol. 1, Doc. 85, *Williams* (Nos. 88-2827, 88-2843); Order, Nov. 7, 1988, at 8).

47. *Id.* (quoting Order, Nov. 7, 1988, at 8-9).

48. *Id.*

49. *Id.*

50. *Id.* at 904.

51. *Id.* (quoting *United States v. Ortiz*, 804 F.2d 1161, 1164 n.2 (10th Cir. 1986) (quoting FED. R. Crv. P. 52(a))).

52. *Id.*

53. *United States v. Williams*, 112 S. Ct. 1735, 1737 (1992).

54. Chief Justice Rehnquist and Justices White, Kennedy and Souter joined the majority opinion. *Id.*

dence' in its possession."⁵⁵ The majority determined that this disclosure rule is not justified as an exercise of the court's supervisory power.⁵⁶ The Court reasoned that because the grand jury is an institution separate from the judicial branch, the judiciary's inherent power to control grand jury procedure is restricted.⁵⁷ The majority also found that the disclosure rule could not be supported by the "common law" of the Fifth Amendment Grand Jury Clause.⁵⁸ The Court opined that if the judiciary set standards of conduct for prosecutors before the grand jury, rather than facilitate the grand jury's ability to be "independent and informed,"⁵⁹ it would drastically change the historical role of the grand jury from an accusatory body deciding probable cause to an adjudicatory body determining guilt or innocence.⁶⁰

In a dissenting opinion,⁶¹ Justice Stevens found that federal courts do have the inherent supervisory power to impose a disclosure rule, but have simply declined to exercise such power.⁶² Justice Stevens supported greater judicial control of grand jury proceedings because a prosecutor is more apt to use unfair tactics before a grand jury due to the *ex parte* nature of the proceedings and the absence of a presiding judge.⁶³ The dissent emphasized that the grand jury is not an "autonomous body"; rather, it is subject to the control of the court during all stages of its life.⁶⁴ Justice Stevens concluded that compelling a prosecutor to present exculpatory evidence would not alter the historical role of the grand jury, but instead would preserve the protective function of the grand jury by ensuring that it returns "independent" and "informed" decisions.⁶⁵

55. *Id.* at 1737. The majority first resolved the procedural question of whether the disclosure rule issue was properly before the Court. *Id.* at 1738. Finding that the petition for certiorari was properly granted, the Court stated:

It is a permissible exercise of our discretion to undertake review of an important issue expressly decided by a federal court where, although the petitioner did not contest the issue in the case immediately at hand, it did so as a party to a recent proceeding upon which the lower courts relied for their resolution of the issue, and did not concede in the current case the correctness of that precedent.

Id. at 1740-41 (footnote omitted).

56. *Id.* at 1742.

57. *Id.*

58. *Id.* at 1744.

59. *Id.* (quoting *Wood v. Georgia*, 370 U.S. 375, 390 (1962)).

60. *Id.*

61. Justices Blackmun, O'Connor, and Thomas joined the dissent. *Id.* at 1737. Justice Thomas did not join the dissent on the issue of whether certiorari was improvidently granted. *Id.*

62. *Id.* at 1752.

63. *Id.* at 1750.

64. *Id.* at 1752.

65. *Id.* at 1753.

This Note first traces the historical development of the grand jury in England and America. It then examines the dual role of prosecutors, and their increasingly powerful influence over the grand jury. This Note then investigates the purpose and breadth of the courts' supervisory power over the grand jury. Next, this Note analyzes the Supreme Court's decision in *United States v. Williams* and its impact on the judiciary's exercise of supervisory power over the grand jury. This Note concludes that the Supreme Court has properly restricted the federal courts from encroaching upon the grand jury's autonomy and has wisely left to the discretion of Congress whether to curb perceived grand jury abuses by imposing a prosecutorial disclosure rule.

I. HISTORY OF THE GRAND JURY

A. *Originating in English Law*

In England, the initiation of criminal charges was historically a private concern.⁶⁶ The victim of a crime, or a surviving relative of the deceased victim, prosecuted his case in a local court, which was typically dominated by a nobleman or landowner.⁶⁷ Once accused, the suspect could establish his innocence either by recruiting eleven persons who would attest under oath to his blamelessness, or by undergoing trial by ordeal or battle.⁶⁸

In 1166 the Crown became actively involved in the prosecution of criminals when King Henry II created the Assize of Clarendon.⁶⁹ The

66. RALPH A. FINE, *ESCAPE OF THE GUILTY* 8 (1986). The private prosecution of crimes was abolished in England in 1819. *Id.* at 10.

67. *Id.* at 9.

68. See Helene E. Schwartz, *Demythologizing the Historic Role of the Grand Jury*, 10 AM. CRIM. L. REV. 701, 707 (1972).

A trial by ordeal, abolished in England in 1215 by the Lateran Council, was conducted in one of four ways. The first required the suspect to hold a piece of burning iron in his hand and walk nine steps without dropping it. The second required the suspect to submerge his hands in a pot of boiling water, the healing of the burns being a divine sign of innocence. The third required the suspect to be thrown into cold water, his innocence manifest if the "pure water accepted him," that is, if he sank. Lastly, the suspect would be found not guilty if he could swallow a piece of bread or cheese without choking to death. FINE, *supra* note 66, at 7-9; see also FRANKEL & NAFTALIS, *supra* note 15, at 9; THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 113-15 (5th ed. 1956) (explaining the ordeals).

A trial by battle was brought to England by the Norman conquerors, and required a physical fight between the victim and the suspect. If the suspect won, it was considered a divine indication of his guiltlessness. FINE, *supra* note 66, at 7-9.

69. Although the Assize is often credited as being the English progenitor of the American grand jury system, some historians cite the Constitutions of Clarendon, as establishing the grand jury. Michael E. Deutsch, *The Improper Use of the Federal Grand Jury: An Instrument for the Internment of Political Activists*, 75 J. CRIM. L. & CRIMINOLOGY 1159, 1163 (1984); Lewis, *supra* note 8, at 36 n.11; Schwartz, *supra* note 68, at 707. In 1164,

Assize established a procedure whereby twelve men were selected in each township to serve on local grand juries.⁷⁰ The grand jurors, rather than the victim of the crime, were responsible for publicly charging an accused with criminal activity.⁷¹ Unlike modern grand jurors, the grand jurors under the Assize system were not required to review evidence and carefully determine the existence of probable cause.⁷² Instead, the grand

Thomas Becket reluctantly signed the Constitutions of Clarendon on behalf of the Church, thereby conceding some of the judicial jurisdiction of the ecclesiastical courts to the Crown. Lewis, *supra*, at 36 n.11; Schwartz, *supra*, at 705. Chapter 6 of the Constitutions prohibited the bishop from charging a layman with a crime unless the bishop identified an accuser who would make his charges publicly, or allowed the sheriff to select twelve men to listen to the evidence against the accused and then submit the charges to the ecclesiastical courts. *Id.* at 706; see also LEROY D. CLARK, *THE GRAND JURY: THE USE AND ABUSE OF POLITICAL POWER* 8 (1975).

Chapter 6 of the Constitutions of Clarendon provided that:

Laymen are not to be accused save by proper and legal accusers and witnesses in the presence of the bishop, so that the archdeacon do not [sic] lose his right nor anything due to him thence. And if the accused be such that no one wills or dares to accuse them, the sheriff, when requested by the bishop, shall cause twelve lawful men from the neighborhood or the town to swear before the bishop that they will show the truth in the matter according to their conscience.

ASSIZE OF CLARENDON, CH. 1, reprinted in GEORGE B. ADAMS & H. MORSE STEPHENS, *SELECT DOCUMENTS OF ENGLISH CONSTITUTIONAL HISTORY* 11, 11 (1926). While some historians posit that the grand jury is really of Frankish, Scandinavian, or Roman origin, most agree that the American federal grand jury was modeled on the grand jury of English common law. See FRANKEL & NAFTALIS, *supra* note 15, at 6-9; PLUCKNETT, *supra* note 68, at 107-10; 1 FREDERICK POLLOCK & FREDERIC W. MATTLAND, *THE HISTORY OF ENGLISH LAW* 151-52 (2d ed. 1968); Maurice S. Glaser, *The Political and Historical Development of the Grand Jury*, 8 LAW SOC'Y J. 192, 192 (1938); Lewis, *supra* note 8, at 36 n.12, 37-38; Wayne L. Morse, *A Survey of the Grand Jury System (Part I)*, 10 OR. L. REV. 101, 102-18 (1931); Schwartz, *supra* at 703, 707.

70. Chapter I of the Assize of Clarendon provides that:

In the first place, the aforesaid King Henry, with the consent of all his barons, for the preservation of the peace and the keeping of justice, has enacted that inquiry should be made through the several counties and through the several hundreds, by twelve of the most legal men of the hundred and by four of the most legal men of each vill, upon their oath that they will tell the truth, whether there is in their hundred or in their vill, any man who has been accused or publicly suspected of himself being a robber, or murderer, or thief, or of being a receiver of robbers, or murderers or thieves, since the lord King has been King. And let justices make this inquiry before themselves, and the sheriffs before themselves.

ASSIZE OF CLARENDON, CH. 1, reprinted in ADAMS & STEPHENS, *supra* note 69, at 14-15.

71. Schwartz, *supra* note 68, at 708. A charge by the Assize of alleged criminal wrongdoing was tantamount to a determination of guilt, and the suspect was usually required to undergo the ordeal by water, a procedure which almost always resulted in drowning. *Id.*; see *supra* note 68.

72. See SARA S. BEALE & WILLIAM C. BRYSON, *GRAND JURY LAW & PRACTICE* § 1:02, at 5 (1986); Ron S. Chun, *The Right to Grand Jury Indictment*, 26 AM. CRIM. L. REV. 1457, 1459 (1989).

jurors were expected to identify from personal knowledge and under oath those persons suspected of having perpetrated crimes.⁷³

Rather than safeguard individual rights, King Henry II's purpose in creating the Assize was to aggrandize the Crown's power at the expense of the ecclesiastical⁷⁴ and baronial courts.⁷⁵ The Assize functioned to centralize the administration of justice under the Crown and to generate revenues for the royal treasury.⁷⁶ Essentially, the Assize acted as an administrative agency to execute the King's laws and political ends.⁷⁷

By 1215, the Magna Carta mandated both presentment and trial by ordeal.⁷⁸ This provision was subsequently codified in a statute which stipulated that the government could not charge an individual with treason or other capital crimes absent an indictment or presentment by a grand jury.⁷⁹ This statutory language was later used in American colonial charters, state constitutions, and ultimately the United States Constitution.⁸⁰

73. PLUCKNETT, *supra* note 68, at 112-13.

74. FRANKEL & NAFTALIS, *supra* note 16, at 6-7. King Henry II recognized that the ecclesiastical courts were eroding the historical absolutism of the English monarchy in several ways. First, the twelfth century witnessed the height of church power and the corresponding development of ecclesiastical law, which threatened the secular English common law. Second, the ecclesiastical courts had absolute jurisdiction for all civil and criminal cases involving clerics, as well as lay cases involving the law of marriage, wills, and the inheritance of property, thereby reducing the King's judicial control over all Britons. *Id.* at 704-05. Third, the church amassed wealth from the fines imposed by its courts. CLARK, *supra* note 69, at 8.

75. See generally FRANKEL & NAFTALIS, *supra* note 16, at 6-7; Douglas P. Currier, Note, *The Exercise of Supervisory Powers to Dismiss a Grand Jury Indictment—A Basis for Curbing Prosecutorial Misconduct*, 45 OHIO ST. L.J. 1077, 1078 (1984); see also Deutsch, *supra* note 69, at 1163.

76. Lewis, *supra* note 8, at 36. When a suspect was arrested under the authority of the Assize, the baronial courts were deprived of jurisdiction over that individual. The King, therefore, and not the barons, was entitled to seize the suspect's property.

The King would also generate revenue by imposing heavy fines on the grand jurors if they did not appear for service when summoned, did not indict an individual suspected of crime, or failed to present an acceptable number of criminals. These funds were used primarily for the purpose of paying mercenaries to defend the kingdom. In *King v. Windham*, 84 Eng. Rep. 113 (K.B. 1667), the English court made it illegal to fine grand jurors for failing to indict. Schwartz, *supra* note 68, at 709 n.41.

77. Currier, *supra* note 75, at 1078. In addition to determining whether a case would go to trial, grand jurors had other responsibilities. Grand jurors were sometimes called upon by the judge to render advice on punishments and pardons. The grand jury also acted as voice for the community, investigating and reporting on problems of social concern, like improperly maintained prisons and bridges. See J.M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND 1660-1800*, at 319-20 (1986); Barry J. Stern, *Revealing Misconduct by Public Officials Through Grand Jury Reports*, 136 U. PA. L. REV. 73, 84 (1987) (discussing the grand jury's reporting function).

78. Chun, *supra* note 72, at 1459.

79. *Id.* at 1460.

80. *Id.*

During the fifteenth and sixteenth centuries, indictment or presentment by grand jury became the leading methods of criminal accusation in England.⁸¹

The seventeenth century witnessed the evolution of the grand jury into a role as "a protector of the citizenry against arbitrary prosecution."⁸² In 1681, King Charles II sought to separately indict Stephen Colledge and Anthony Ashley Cooper, Earl of Shaftesbury, for treason.⁸³ Both men were Protestants who vigorously opposed the King's efforts to reestablish the Roman Catholic Church in England.⁸⁴ In each case, the grand jury members rejected the King's attempts to influence their decision and refused to indict.⁸⁵ Thus, the grand jury assumed the func-

81. *Id.* When a grand jury accused an individual on its own initiative, the charging document was called a presentment. The grand jury eventually stopped relying solely on the knowledge of its jurors to identify suspected criminals. When royal authorities informed the grand jury of suspected criminals and submitted evidence for its consideration, the charging document was called an indictment. If the grand jury determined there was adequate evidence to bring the accused to trial, it returned a "true bill." If, however, the grand jury found the evidence inadequate to justify a trial, it marked the indictment "no bill" or "not a true bill." See Acker, *supra* note 2, at 44; see also *supra* note 2 and accompanying text.

82. *Nixon v. Sirica*, 487 F.2d 700, 789 (D.C.Cir. 1973) (Wilkey, J., dissenting); see also FRANKEL & NAFTALIS, *supra* note 16, at 9; Chun, *supra* note 72, at 1460-61.

By the seventeenth century, the grand jury no longer played such a central role in the English system of government for two reasons. First, as petit juries began to supplant trials by ordeal, and as the distinction between grand juries and petit juries became clear, a grand jury indictment was no longer considered tantamount to a determination of guilt. Second, as the parliamentary system became more established and could exercise its power to tax, the Crown no longer relied upon the grand jury as a primary source of revenue. CLARK, *supra* note 69, at 9; Schwartz, *supra* note 68, at 710-11. The struggle for power was now between the King and Parliament, not the grand jury. Schwartz, *supra*, at 711.

83. Currier, *supra* note 75, at 1078.

84. *Id.*

85. Lewis, *supra* note 8, at 37. Upon learning that James, the brother of Charles II and also a Roman Catholic, might ascend to the throne, Lord Shaftesbury submitted a bill of indictment to the grand jury alleging that James had broken the laws mandating recognition of the Anglican Church. The King instructed the court to dismiss the grand jurors before they could consider the bill, and in retaliation, presented a bill to a grand jury in London which alleged that Stephen Colledge, a follower of Shaftesbury, had made treasonous statements and was planning to overthrow the King. The grand jury did not indict. See CLARK, *supra* note 69, at 9-10; Schwartz, *supra* note 68, at 712-14.

In response, King Charles II sought the indictment of Shaftesbury for treason. On November 24, 1681, Chief Judge Pemberton instructed the grand jury:

"And let me tell you, if any of you shall be refractory, and will not find any bill, where there is a probable ground for an accusation, you do therein undertake to intercept justice: and you thereby make yourselves criminals and guilty, and the fault will lie at your door."

United States v. Asdrubal-Herrera, 470 F. Supp. 939, 942 (N.D. Ill. 1979) (quoting 8 How. St. Tr. 770 (1681)). Despite the biased charge, the grand jury refused to indict. Schwartz, *supra*, at 716-18.

tion of protecting citizens against the oppressive exercise of executive power.⁸⁶

B. *Developing in America*

The English colonists in the New World modeled their legal institutions on those of England, and each colony incorporated the grand jury into its judicial system.⁸⁷ Like their English counterparts, colonial grand jurors presented suspected criminals and protected innocents from wrongful prosecution.⁸⁸ They planned the scope and direction of their investigations and gathered their own evidence.⁸⁹ In addition to serving as an accusatory panel, the colonial grand jury assumed many additional roles that their English counterparts did not play. Becoming an essential part of local government, the colonial grand jury represented the people in its community, suggested new laws, exposed governmental abuses, identified municipal problems such as roads and bridges in need of repair, and performed administrative duties.⁹⁰

During the American Revolution, colonists perceived the grand jury as a weapon to oppose British authority and to further the goals of the Revolution.⁹¹ By returning "no bills" in response to presentments made by British officials,⁹² colonial grand juries could frustrate the enforcement

86. Currier, *supra* note 75, at 1078; Glaser, *supra* note 69, at 203; Lewis, *supra* note 8, at 37-38. The assertion that these two cases represent specifically when and how the grand jury assumed its protective function is somewhat problematic because of what later happened to Colledge and Shaftesbury. Colledge was indicted upon the presentment of less evidence by a grand jury sitting in Oxford. While the London grand jury was composed of Protestants selected by Protestant sheriffs, the Oxford grand jurors were more sympathetic to the King. Colledge was then tried by a petit jury, convicted, and executed. Fearing that he would be indicted by a second grand jury composed of members loyal to the King, Shaftesbury fled to Holland and died in exile in 1683. See CLARK, *supra* note 69, at 11-12; FRANKEL & NAFTALIS, *supra* note 16, at 10; Bruce H. Schneider, *The Grand Jury: Powers, Procedures, and Problems*, 9 COLUM. J.L. & SOC. PROBS. 681, 682-83 n.9 (1973); Schwartz, *supra* note 68, at 719-20.

87. BEALE & BRYSON, *supra* note 72, § 1:03, at 12-16; Acker, *supra* note 1, at 46.

88. BEALE & BRYSON, *supra* note 72, § 1:03, at 12-16; YOUNGER, *supra* note 9, at 26.

89. Because England did not have an organized police force until 1824 or a public prosecutor system until 1879, English grand jurors conducted their own investigations. Whyte, *supra* note 9, at 482-83.

90. YOUNGER, *supra* note 9, at 5-20, 26.

91. *Id.* at 27; see FRANKEL & NAFTALIS, *supra* note 16, at 12 (stating that grand juries during the American Revolution "functioned as both patriotic organs and propaganda agencies, adopting resolutions condemning Great Britain and urging the people to support the struggle for freedom").

92. YOUNGER, *supra* note 9, at 37 ("Since the early days of the struggle against England, Revolutionary leaders had effectively labeled the information of a prosecutor as an odious instrument of British tyranny, while at the same time they had hailed indictment by a grand jury as one of their rights as Englishmen.").

of unpopular English laws and protect colonists who flouted British authority.⁹³ One famous example involved publisher John Peter Zenger who published newspaper articles in the *New York Weekly Journal* allegedly libeling Governor Cosby and angering British officials.⁹⁴ Despite strong admonishments by Chief Justice Delancey of the New York Supreme Court, a friend of Governor Cosby, two grand juries in New York refused to indict Zenger.⁹⁵ During the Revolution, the grand jury continued to address local concerns and served to smooth the transition from royal to state government.⁹⁶

When the United States Constitution was submitted to the states for ratification, it contained no grand jury provision.⁹⁷ During the state ratifying conventions, some representatives persuasively argued to amend the federal constitution to require that federal prosecutions be initiated by grand jury presentment or indictment.⁹⁸ In light of these arguments,

93. *Id.* at 27. In many instances, the grand juries were blatantly partisan and refused to indict not because the evidence was insufficient, but because they condoned the conduct. Grand jurors, for instance, returned a "no bill" where royal officials sought to indict the leaders of the Stamp Act Rebellion in 1765. BEALE & BRYSON, *supra* note 72, § 1:03, at 15; YOUNGER, *supra*, at 28; Acker, *supra* note 1, at 46 n.79. Grand jurors also refused to indict the editors of the *Boston Gazette* for libeling Governor Francis Bernard in 1768, despite Chief Justice Thomas Hutchinson's charge to the grand jurors that they would be "damned if they did not find a true bill." YOUNGER, *supra*, at 28 (quoting letter to Chief Justice Oliver, BOSTON GAZETTE, Mar. 31, 1777); see also FRANKEL & NAFTALIS, *supra* note 16, at 11.

94. See 1 PELEG W. CHANDLER, AMERICAN CRIMINAL TRIALS 153-55 (1970); Acker, *supra* note 1, at 46.

95. FRANKEL & NAFTALIS, *supra* note 16, at 11; Note, *The Grand Jury as an Investigatory Body*, 74 HARV. L. REV. 590, 590-91 (1961). Zenger was later charged by information, arrested, and acquitted at trial. See BEALE & BRYSON, *supra* note 72, § 1:03 at 15; 1 CHANDLER, *supra* note 93, at 155-206; FRANKEL & NAFTALIS, *supra* note 15, at 11; HELEN H. MILLER, THE CASE FOR LIBERTY 31-33 (1965); THE TRIAL OF PETER ZENGER 35, 93-132 (Vincent Buranelli ed., Greenwood Press 1975) (1957); Acker, *supra* note 1, at 46 n.79; Schwartz, *supra* note 68, at 723 n.105.

96. YOUNGER, *supra* note 9, at 36-37. Grand juries suggested price controls for essential goods, ensured that officials and local agencies performed their duties, inspected town records, and determined tax rates. *Id.*

97. BEALE & BRYSON, *supra* note 72, § 1:04, at 18-19; YOUNGER, *supra* note 9, at 44-45; Acker, *supra* note 1, at 46.

98. During the Massachusetts ratifying convention, Abraham Holmes commented that there is no provision made in the Constitution to prevent the attorney-general from filing information against any person, whether he is indicted by the grand jury or not; in consequence of which the most innocent person in the commonwealth may be taken by virtue of a warrant issued in consequence of such information, and dragged from his home, his friends, his acquaintance, and confined in prison, until the next session of the court . . . and after long, tedious, and painful imprisonment, though acquitted on trial, may have no possibility to obtain any kind of satisfaction for the loss of his liberty, the loss of his time, great expenses, and perhaps cruel sufferings.

the Massachusetts convention, later followed by the New York and New Hampshire conventions, recommended that Congress amend the Constitution to include such a provision.⁹⁹ James Madison received eight such proposals from the states, and on June 8, 1789, he proposed to the first Congress an amendment ensuring the right to a grand jury indictment for all infamous or capital crimes.¹⁰⁰ Madison's proposal was rephrased, passed by the House and Senate, and ratified on December 15, 1791 as the Fifth Amendment to the Constitution of the United States.¹⁰¹

The Framers of the Constitution intended the federal grand jury, like its English forerunner, to act as both a "sword and a shield."¹⁰² As a sword, the grand jury has extraordinary power to carry out its investigatory function, and acts free of procedural or evidentiary rules.¹⁰³ For example, the grand jury has at its disposal broad subpoena,¹⁰⁴ immunity,¹⁰⁵ and contempt powers.¹⁰⁶ Although these powers are exercised under the court's supervision and are not unlimited,¹⁰⁷ the grand jury may use them

2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 110 (Jonathan Ellito ed., 2d ed. 1901); *see also* BEALE & BRYSON, *supra* note 72, § 1:04, at 19; YOUNGER, *supra* note 9, at 45; Acker, *supra* note 1, at 46 n.84.

99. Speaking for the Massachusetts convention, John Hancock proposed nine amendments to the Constitution. The sixth proposed amendment provided for the right to indictment by a grand jury for infamous or capital crimes. BEALE & BRYSON, *supra* note 72, § 1:04, at 19; *see* 2 GEORGE T. CURTIS, HISTORY OF THE ORIGIN, FORMATION, AND ADOPTION OF THE CONSTITUTION OF THE UNITED STATES 537, 540 (1858); YOUNGER, *supra* note 9, at 45; Acker, *supra* note 1, at 47 n.85.

100. BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 163-65 (1977). James Madison's proposed amendment required that "in all crimes punishable with loss of life or member, presentment or indictment by a grand jury shall be an essential preliminary." *Id.* at 233; *see also* BEALE & BRYSON, *supra* note 72, § 1:04, at 19; Acker, *supra* note 1, at 48.

101. BEALE & BRYSON, *supra* note 72, § 1:04 at 19; YOUNGER, *supra* note 9, at 46; Acker, *supra* note 1, at 49; Chun, *supra* note 72, at 1466-67.

102. *United States v. Cox*, 342 F.2d 167, 186 n.1 (5th Cir.) (Wisdom, J., concurring) ("The Grand Jury is both a sword and a shield of justice—a sword because it is the terror of criminals, a shield because it is the protection of the innocent against unjust prosecution." (quoting FEDERAL GRAND JURY HANDBOOK 8 (1959)), *cert. denied*, 381 U.S. 935 (1965).

103. *See, e.g., United States v. Calandra*, 414 U.S. 338, 349 (1974) ("Because the grand jury does not finally adjudicate guilt or innocence, it has traditionally been allowed to pursue its investigative and accusatorial functions unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial."); *see also* FED. R. EVID. 1101(d) (stating that "[t]he rules [of evidence] do not apply [to] . . . [p]roceedings before grand juries").

104. FED. R. CRIM. P. 17(a); *see infra* note 107.

105. 18 U.S.C. §§ 6002, 6003 (1988).

106. FED. R. CRIM. P. 17(g).

107. The grand jury depends on the court to execute its subpoena power. *Calandra*, 414 U.S. at 346 n.4 (stating that the grand jury may ask the court "to compel production of books, papers, documents, and the testimony of witnesses"). The court, however, may limit the grand jury's subpoena power in certain circumstances. *Id.* at 346 (stating that

to obtain "every man's evidence."¹⁰⁸ As a shield, the grand jury is designed "to provide a fair method for instituting criminal proceedings."¹⁰⁹ The grand jury, after deliberating in secret,¹¹⁰ allows the government to prosecute only those persons for whom it has probable cause to believe have committed a crime.¹¹¹ The prosecutor plays an indispensable role in helping the grand jury make its determination of probable cause.

grand jury subpoena power is "not unlimited"). The court, for instance, may quash or modify a subpoena on motion if it is overly broad, or "if compliance would be 'unreasonable or oppressive.'" *Id.* at 346 n.4 (citing FED. R. CRIM. P. 17(c)); *see, e.g.,* *United States v. Mandujano*, 425 U.S. 564, 573 (1976) (holding that the Fourth Amendment requires a grand jury to show that its subpoena for documents is reasonably related to its investigation); *Branzburg v. Hayes*, 408 U.S. 665, 708 (1972) ("Grand juries are subject to judicial control and subpoenas to motions to quash."); *In re Grand Jury Subpoena: Subpoena Duces Tecum* (Model Magazine), 829 F.2d 1291, 1302 (4th Cir. 1987) (quashing grand jury subpoena *duces tecum* because of vagueness and over-intrusiveness); *In re Horowitz*, 482 F.2d 72, 75-80 (2d Cir.) (tracing the development of the overbreadth doctrine for grand jury subpoenas *duces tecum*), *cert. denied*, 414 U.S. 867 (1973). A grand jury, moreover, may not use its subpoena power to infringe upon a constitutional, statutory, or common law privilege. *Calandra*, 414 U.S. at 346. For example, a grand jury witness can not be forced to respond to questions that would violate his Fifth Amendment privilege against self-incrimination, unless the witness is granted immunity. *Id.* (citing *Kastigar v. United States*, 406 U.S. 441 (1972)).

108. *Branzburg*, 408 U.S. at 688 (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)); *see also* *Calandra*, 414 U.S. at 344 ("A grand jury investigation 'is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed.'" (quoting *United States v. Stone*, 429 F.2d 138, 140 (2d Cir. 1970))).

109. *Costello v. United States*, 350 U.S. 359, 362 (1956).

110. In *United States v. Proctor & Gamble Co.*, 356 U.S. 677 (1958), the Supreme Court explained that the grand jury deliberates in secret in order

"(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

Id. at 681-82 n.6 (quoting *United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954)); *see also* FRANKEL & NAFTALIS, *supra* note 16, at 23-24.

111. *See* *Wood v. Georgia*, 370 U.S. 375, 390 (1962). A federal grand jury is composed of "not less than 16 nor more than 23 members," of whom 12 must concur to return an indictment. FED. R. CRIM. P. 6(a), (f); *see* FRANKEL & NAFTALIS, *supra* note 16, at 18. In determining probable cause, the grand jury has "the power to charge a greater offense or a lesser offense; numerous counts or a single count; and . . . a capital offense or a noncapital offense." *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986). The grand jury, moreover, "is not bound to indict in every case where a conviction can be obtained." *Id.* (quoting *United States v. Ciambone*, 601 F.2d 616, 629 (2d Cir. 1979) (Friendly, J., dissenting)).

II. ROLE OF THE PROSECUTOR

A. *Acting as Advocate and Advisor*

When a United States Attorney comes before the grand jury, he performs the dual role of "pressing for an indictment and of being the grand jury's advisor."¹¹² As an advocate seeking an indictment, he must "prosecute with earnestness and vigor."¹¹³ A prosecutor, however, does not represent an "ordinary party to a controversy" whose goal is always to win its case.¹¹⁴ Rather, the prosecutor is an agent of the United States government, whose obligation is to execute the laws in an impartial and just manner.¹¹⁵ Thus, the prosecutor must assist, but not direct, the grand jury in making its determination of probable cause.¹¹⁶

B. *Growing Power and Influence*

A United States Attorney possesses enormous power over the grand jury by virtue of the multiple duties he performs.¹¹⁷ The prosecutor requests that a grand jury be impaneled¹¹⁸ and then directs the grand jury

112. *Ciambrone*, 601 F.2d at 628 (Friendly, J., dissenting) (citing *United States v. Remington*, 208 F.2d 567, 573-73 (2d Cir. 1953) (Hand, J., dissenting), *cert. denied*, 347 U.S. 913 (1954)).

113. *See* *Berger v. United States*, 295 U.S. 78, 88 (1935), *overruled on other grounds by* *Stirone v. United States*, 361 U.S. 212 (1960).

114. *Id.* In *Berger*, Justice Sutherland concluded:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation [is] to govern impartially . . . and whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

Id.

115. *Id.*; *see also* *United States v. Dorfman*, 532 F. Supp. 1118, 1132 (N.D. Ill. 1981) ("A prosecutor is not simply another advocate. He is the attorney of the people, and as such, has an independent duty to seek justice even when it may hurt his case." (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1980))).

116. *See* *Currier*, *supra* note 75, at 1079; *see also* *Ciambrone*, 601 F.2d at 628 (Friendly, J., dissenting) (stating that in a case where a prosecutor's role as an advocate conflicts with his responsibility to be a grand jury's impartial advisor, "the latter duty must take precedence").

117. 8 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE ¶ 6.04[1] (2d ed. 1988) (stating that "[t]he prosecutor is in control of grand jury proceedings"); *Schneider*, *supra* note 86, at 699 ("As the lone professional in a judicial proceeding otherwise conducted by laymen and as a high government official, the prosecutor has great influence with the grand jury throughout its hearings.").

118. A United States Attorney brings cases before a grand jury for two purposes: indictment and investigation. 8 MOORE, *supra* note 117, ¶ 6.04[1], at 6-94. Those cases submitted for indictment often "involve simple fact situations and may be presented in a matter of minutes." *Id.* These cases may include matters originally submitted for investigation for which the prosecutor later requests an indictment. *Id.* Cases submitted for in-

proceedings.¹¹⁹ The prosecutor gathers and presents evidence; selects and examines witnesses;¹²⁰ informs the jurors of the offenses charged and educates the jurors on the law;¹²¹ and requests and almost always drafts an indictment.¹²² The United States Attorney is permitted to always be present in the grand jury room during the investigative portion of the proceedings,¹²³ and represents the grand jury at hearings before the federal judiciary.¹²⁴

In submitting a case to a grand jury, a prosecutor exercises wide discretion.¹²⁵ But because he must act in "good faith,"¹²⁶ the prosecutor may not mislead the grand jury "or . . . engage in fundamentally unfair tactics before it."¹²⁷ It is improper, for instance, for the prosecutor to secure an

vestigation usually begin with the identification of some primary suspects, but further factual discovery is necessary to determine the extent of the criminal activity and the identity of other possible suspects. *Id.* at 6-94 to -95. When the prosecutor uses a grand jury for investigative purposes, the prosecutor "has presumably not yet formed an opinion as to the prosecution," and can "[i]n one sense . . . engage in a fishing expedition without violating any principle of law or ethics." *Id.*

119. See BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 2.01, at 2-2 (1993) (stating that "[e]veryone familiar with grand jury practice recognizes that the prosecutor runs the show"); Antell, *supra* note 8, at 155 ("The so-called grand jury 'investigation' . . . is really nothing more than a review of the prosecutor's predigested evidence and a ratification of his conclusions."). Grand jury proceedings are shrouded in secrecy; only the grand jurors, prosecutor, witnesses, stenographer, operator or recording device and interpreter, if necessary, may attend. FED. R. CRIM. P. 6(d).

120. *United States v. Remington*, 208 F.2d 567, 573 (2d Cir. 1953) (L. Hand, J., dissenting) (stating that "[s]ave for torture, it would be hard to find a more effective tool of tyranny than the power of unlimited and unchecked *ex parte* examination"), *cert. denied*, 347 U.S. 913 (1954).

121. See Currier, *supra* note 75, at 1079.

122. *Id.*; *United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977).

123. While evidence is being presented by the prosecutor, no judge is present to oversee the proceedings and no attorney is present to protect the limited rights of the defendant or grand jury witnesses. *Chanen*, 549 F.2d at 1312.

The prosecutor, however, may not enter the grand jury room during grand jury deliberations or voting. See Currier, *supra* note 75, at 1080; Michael K. Williams, Note, *Grand Jury: Bulwark of Prosecutorial Immunity*, 3 LOY. U. CHI. L.J. 305, 310 (1972).

124. Sullivan & Nachman, *supra* note 8, at 1050.

125. See *United States v. Gold*, 470 F. Supp. 1336, 1353 (N.D. Ill. 1979).

126. *United States v. Basurto*, 497 F.2d 781, 786 (9th Cir. 1974) (stating that the prosecutor must exercise "good faith . . . with respect to the court, the grand jury and the defendant").

127. *United States v. Ciambone*, 601 F.2d 616, 623 (2d Cir. 1979); see also Berger v. United States, 295 U.S. 78, 88 (1935) (stating that while a prosecutor "may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."), *overruled on other grounds by* *Stirone v. United States*, 361 U.S. 212 (1960).

indictment on the basis of evidence he knows is perjurious,¹²⁸ or to lead the grand jury to think "it has received eyewitness rather than hearsay testimony."¹²⁹

Over time, grand jurors have become more dependent upon the prosecutor in several ways.¹³⁰ First, unlike early English and colonial grand jurors who identified suspected criminals from personal knowledge, modern grand jurors generally lack any personal knowledge of criminal activities and must wait for the prosecutor to bring cases to them.¹³¹ Second, while early English and colonial grand juries gathered their own evidence, modern grand juries evaluate evidence as it is collected by governmental agencies and revealed to them at the discretion of the prosecutor.¹³² Thus, although modern grand juries may request additional evidence and question witnesses directly,¹³³ they are restricted to conducting investigations from within the four walls of the grand jury room.¹³⁴ Third, English and colonial grand jurors could easily understand the common law crimes of murder, robbery, rape and arson, offenses for which they usually indicted defendants.¹³⁵ Modern grand jurors, however, are confronted with a plethora of complex federal statutory crimes. Usually lacking any legal training,¹³⁶ modern grand jurors

128. *Ciambrone*, 601 F.2d at 623.

129. *Id.* (citing *United States v. Estepa*, 471 F.2d 1132, 1136-37 (2d Cir. 1972)).

130. *See id.* at 622 (stating that the grand jury "must lean heavily upon the United States Attorney as its investigator and legal advisor to present to it such evidence as it needs for its performance of its function and to furnish it with controlling legal principles"); Recent Case, 104 U. PA. L. REV. 429, 431 (1955) ("Although the grand jury was originally conceived to inquire after offenses and bring charges, its investigative and accusatory functions have been largely supplanted by the development of the public prosecutor." (footnote omitted)).

131. FINE, *supra* note 66, at 9. *See generally* Sharon LaFraniere, *The Grand Jury That Couldn't*, WASH. POST, Nov. 10, 1992, at A1, A4 (discussing the frustration of a grand jury that wanted to bring an indictment but was not presented with one by the prosecutor).

132. FINE, *supra* note 66, at 9. In fact, no federal statute or judicial decision permits the grand jury to obtain outside investigatory assistance; it depends solely upon the United States Attorney. Comment, *Powers of Federal Grand Juries*, 4 STAN. L. REV. 68, 70 (1951).

133. Currier, *supra* note 72, at 1080. *But see* REPORT ON PROSECUTION, *supra* note 9, at 36 ("Where the number of prosecutions is large, it is hard for the grand jury in any ordinary case to get at other facts than those presented to them, or even to know that it is authorized to get at them.").

134. Brice, *supra* note 7, at 764.

135. 1 POLLOCK & MATTLAND, *supra* note 69, at 152; R.H. Helmholz, *The Early History of the Grand Jury and the Canon Law*, 50 U. CHI. L. REV. 613, 613 (1983).

136. The qualifications which a person have in order to be a grand juror are minimal. According to the Jury System Improvements Act of 1978, a prospective juror need simply be a United States citizen; be at least eighteen years of age; be able to read, write, and speak the English language; be physically and mentally able to serve; and not have been charged or convicted of a felony. 28 U.S.C. § 1865 (1988). Federal grand jurors are chosen "at random from a fair cross section of the community," and may not be excluded from

must often make determinations of probable cause in cases such as income tax evasion,¹³⁷ mail¹³⁸ and wire fraud,¹³⁹ and violations of the Hobbs Act,¹⁴⁰ the Extortionate Credit Transaction Act,¹⁴¹ the Racketeer Influenced Corrupt Organizations Act (RICO),¹⁴² the Travel Act,¹⁴³ and the antitrust laws.¹⁴⁴

Thus, the modern grand jury has become more passive, coming to rely more heavily upon the prosecutor.¹⁴⁵ Such dependency has eroded the grand jury's ability to be "independent and informed,"¹⁴⁶ making it vulnerable to prosecutorial manipulation.¹⁴⁷ To remedy this problem, some federal courts have exercised their inherent supervisory power to curb prosecutorial abuse and to ensure the integrity of the grand jury process.

III. EXERCISE OF SUPERVISORY POWER

A. Overseeing Judicial Proceedings

The term supervisory power refers to the inherent authority of federal courts to oversee their own proceedings.¹⁴⁸ The most distinctive aspect of the supervisory power doctrine is that it is not rooted in any identifiable constitutional or statutory provision,¹⁴⁹ but is justified by policy consider-

service on the basis of "race, color, religion, sex, national origin, or economic status." *Id.* §§ 1861, 1862; *see also* BEALE & BRYSON, *supra* note 72, § 4:02, at 5-6.

137. 26 U.S.C. § 7201 (1988).

138. 18 U.S.C. § 1341 (Supp. III 1991).

139. *Id.* § 1343.

140. *Id.* § 1951 (1988).

141. *Id.* §§ 891-894.

142. *Id.* § 1962.

143. *Id.* § 1952; *see* BEALE & BRYSON, *supra* note 72, § 1:06, at 34 n.5 (stating that the Travel Act of 1961 creates criminal sanctions "for interstate travel intended to facilitate gambling, narcotic traffic, prostitution, extortion, and bribery—illegal activities that are often associated with organized crime").

144. 15 U.S.C. § 1 (1988 & Supp. III 1991); *see also* Vaira, *supra* note 8, at 1144 (emphasizing the complexity of modern crimes).

145. *See, e.g.,* United States v. Asdrubal-Herrera, 470 F. Supp. 939, 943 (N.D. Ill. 1979) ("The grand jury places great trust in the United States Attorney.").

146. United States v. Flomenhoft, 714 F.2d 708, 711 (7th Cir. 1983) (citing United States v. Mandujano, 425 U.S. 564, 573 (1976)). Courts have defined "independent and informed" to mean that the grand jury "must be able to obtain all relevant evidence." *Id.*; *see also* United States v. Calandra, 414 U.S. 338, 343-44 (1974); *supra* note 107 and accompanying text.

147. Currier, *supra* note 75, at 1080 (stating that jurors often believe a defendant must be guilty simply because the government seeks an indictment against him).

148. Matthew E. Brady, Note, *A Separation of Powers Approach to the Supervisory Power of the Federal Courts*, 34 STAN. L. REV. 427, 427 n.2 (1982).

149. *See infra* notes 151-53 and accompanying text. The supervisory power may be justified as an implied power pursuant to Article III. U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."). Such "implied

ations.¹⁵⁰ The Supreme Court has explained the exercise of its supervisory power as necessary to ensure the integrity of judicial proceedings¹⁵¹ and the reliability of evidence,¹⁵² to redress transgressions of individual rights, and to deter governmental misconduct.¹⁵³ The Court has exercised its supervisory power in both criminal and civil cases,¹⁵⁴ although it has focused primarily on procedural and evidentiary issues in federal

judicial authority is analogous to . . . implied presidential authority." Sara S. Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1466 (1984). The authority is also similar to the explicit congressional power to take all action "necessary and proper." U.S. CONST. art. I, § 8; see, e.g., *United States v. Nixon*, 418 U.S. 683, 706 n.16 (1974) (suggesting that the President's authority includes all powers "reasonably appropriate and relevant to the exercise of a granted power"); see also Beale, *supra*, at 1468 (stating that "every constitutional grant of authority implicitly includes at least the incidental or ancillary authority that is absolutely necessary to permit the exercise of the expressly granted powers").

150. See *infra* notes 151-53 and accompanying text.

151. *Id.* at 427-28, 436. *McNabb v. United States*, 318 U.S. 332 (1943), is considered "the first supervisory power decision." Beale, *supra* note 149, at 1435. In *McNabb*, the Supreme Court excluded a defendant's confession from evidence because it was given after a prolonged illegal detention. *McNabb*, 318 U.S. at 344-47. See generally Note, *The Supervisory Power of the Federal Courts*, 76 HARV. L. REV. 1656, 1660-63 (1963) (arguing that the statutory power used by the Supreme Court in *McNabb* was really an attempt to control police activities and does not help in determining when a Court may use supervisory power). In legitimizing such an assertion of power, the Court reasoned that federal courts are obligated to maintain the integrity of judicial processes. *McNabb*, 318 U.S. at 340 ("Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence."). See also *Ballard v. United States*, 329 U.S. 187, 195 (1946) (stating that when women are systematically excluded from jury service, the harm "is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts"); *United States v. Cederquist*, 641 F.2d 1347, 1352 (9th Cir. 1981) (the goal of a court in dismissing an indictment on Fifth Amendment Due Process grounds or upon its own inherent supervisory power, "is to protect the integrity of the judicial process"). Prior to *McNabb*, Congress alone regulated federal judicial procedure. Where Congress failed to prescribe procedure by statute, federal courts relied on common law practices. See Beale, *supra* note 149, at 1435-38. In the early twentieth century, a movement to establish a uniform set of rules governing judicial procedure led to joint efforts between Congress and the Supreme Court to promulgate the Federal Rules of Civil Procedure in 1938 and the Federal Rules of Criminal Procedure in 1940. The Court's *McNabb* decision followed three years later. *Id.* at 1439-40.

152. See, e.g., *Mesarosh v. United States*, 352 U.S. 1, 14 (1956) (stating that "this Court has supervisory jurisdiction over the proceedings of the federal courts," and that it "has . . . [a] duty . . . to see that the waters of justice are not polluted").

153. See, e.g., *Elkins v. United States*, 364 U.S. 206 (1960) (holding that evidence obtained by an unreasonable search and seizure is inadmissible upon defendant's timely objection); see also Beale, *supra* note 149, at 1455.

154. See e.g., *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 225 (1946) (exercising the Court's supervisory power to strike a jury panel where wage earners had been intentionally excluded, in order "to guard against the subtle undermining of the jury system"); see also *infra* note 155.

criminal cases.¹⁵⁵ Under Chief Justice Burger, the Court began to cut back sharply on the exercise of its supervisory power, a trend that has continued to the present.¹⁵⁶

B. Curbing Grand Jury Abuse

The Supreme Court has rarely considered matters of grand jury abuse, and has considered only recently the exercise of supervisory power by the federal courts¹⁵⁷ to remedy grand jury abuse.¹⁵⁸ The Court has enforced

155. See, e.g., *Rosales-Lopez v. United States*, 451 U.S. 182, 190-92 (1981) (plurality opinion) (exercising the Court's supervisory power to oversee voir dire procedure in order to ensure the impaneling of an impartial jury); *United States v. Nobles*, 422 U.S. 225, 231-32 (1975) (exercising supervisory power to compel the production of investigative report by defense); *McCarthy v. United States*, 394 U.S. 459, 471-72 (1969) (exercising supervisory power to set aside a guilty plea and remove case for another hearing to comply with Federal Rules of Criminal Procedure), *superseded by statute on other grounds as stated in United States v. Goldberg*, 862 F.2d 101 (6th Cir. 1988); *Marshall v. United States*, 360 U.S. 310, 312 (1959) (per curiam) (exercising supervisory power to require a new trial where federal jurors had been exposed to pretrial publicity); *Jencks v. United States*, 353 U.S. 657, 667 (1957) (exercising supervisory power to require production of documents that are relevant and not protected by an exclusionary rule), *superseded by statute on other grounds as stated in United States v. Gatto*, 763 F.2d 1040 (9th Cir. 1985); *Ballard*, 329 U.S. at 193 (exercising its supervisory power "over the administration of justice" to require that jurors in federal criminal cases are chosen from a fair cross section of community and do not exclude women); see also Beale, *supra* note 149, at 1449-50 (providing examples of the use of supervisory power by courts).

156. See Brady, *supra* note 148, at 432 (noting that neither the Warren Court nor the Burger Court exercised supervisory power between 1963 and 1979).

157. One commentator has noted that "[a]lthough the source of the lower federal courts' supervisory authority has not been identified, both the Supreme Court and the lower federal courts have generally assumed that these courts possess supervisory authority in their own circuits or districts like that wielded by the Supreme Court on a nationwide level." Beale, *supra* note 149, at 1455.

Helwig v. United States, 162 F.2d 837 (6th Cir. 1947), is the first case in which a federal court of appeals exercised its supervisory power to reverse a defendant's conviction and order a new trial. The Supreme Court first recognized the exercise of supervisory power by the lower federal courts in *Bartone v. United States*, 375 U.S. 52 (1963), where it found that "in federal proceedings . . . both the Courts of Appeals and this Court have broad powers of supervision." *Id.* at 54 (citation omitted); see Beale, *supra* note 149, at 1455-56 n.157.

158. In the absence of definitive Supreme Court action, lower federal courts have undertaken to supervise grand jury procedure. Historically, lower federal courts have cited at least two sources of authority to justify the dismissal of indictments. See GERSHMAN, *supra* note 119, § 2.2, at 2-5; Sarah A. Gardner, Comment, *Confusion in the Grand Jury: A New Standard for Dismissal Based on Prosecutorial Misconduct*, 55 BROOK. L. REV. 249, 258-59 (1989). First, courts have dismissed indictments on constitutional grounds, where the prosecutor has infringed the defendant's Fifth Amendment right to due process. See, e.g., *United States v. Basurto*, 497 F.2d 781, 787 (9th Cir. 1974) (reversing the defendant's conviction because it violated the defendant's due process rights to have him stand trial on indictment that the Government procured through the use of material perjured testimony); *United States v. DeMarco*, 401 F. Supp. 505, 514 (C.D. Cal. 1975) (dismissing an indict-

statutory rules governing the grand jury, but has consistently refused to exercise its own supervisory power to regulate the grand jury.¹⁵⁹ It has reasoned that because the grand jury is not textually assigned to any of the three branches of federal government by the Constitution, it is a wholly independent body that should remain unfettered from judicially-imposed procedural rules.¹⁶⁰

ment on due process grounds where the prosecutor, acting out of possibly vindictive motives, threatened to increase the charges if the defendant exercised his statutory venue rights), *aff'd*, 550 F.2d 1224 (9th Cir.), *cert. denied*, 434 U.S. 827 (1977). *But see* United States v. Cederquist, 641 F.2d 1347, 1352 (9th Cir. 1981) (reversing the dismissal of an indictment based on the prosecutorial delay based on finding that there was no violation of defendant's constitutional rights); United States v. Chanen, 549 F.2d 1306, 1309 (9th Cir.) (reversing the dismissal of an indictment based on the fact that the prosecutor presented false evidence to a grand jury because such conduct was found not to be fundamentally unfair to the defendant), *cert. denied*, 434 U.S. 825 (1977). When the abuse has not risen to the level of a constitutional violation, courts have also dismissed indictments pursuant to their inherent supervisory power. *See, e.g.*, United States v. Serubo, 604 F.2d 807, 817-18 (3d Cir. 1979) (affirming the dismissal of an indictment because of prosecutorial misconduct, even in absence of prejudice); United States v. Jacobs, 547 F.2d 772, 777 (2d Cir. 1976) (exercising supervisory power to dismiss a perjury indictment where the prosecutor did not properly warn the grand jury witness that she was the target of the investigation), *cert. dismissed*, 436 U.S. 31 (1978); United States v. Short, 777 F. Supp. 40, 42-43 (D.D.C. 1991); United States v. Phillips Petroleum Co., 435 F. Supp. 610, 618-19 (N.D. Okla. 1977); *supra* note 25 and accompanying text; *see also* United States v. Hogan, 712 F.2d 757, 761-62 (2d Cir. 1983) (reversing a conviction where the prosecutor impaired the grand jury's independence by using hearsay evidence, introducing false testimony, and making inflammatory remarks); United States v. Estepa, 471 F.2d 1132, 1136-37 (2d Cir. 1972) (reversing a defendant's conviction where the prosecutor misled the grand jury with hearsay evidence). *Cf. Cederquist*, 641 F.2d at 1352; *Chanen*, 549 F.2d at 1309.

159. The Supreme Court, for instance, has declined to offer protection to grand jury witnesses unless their claims rest on a recognized privilege. *See, e.g.*, United States v. Callandra, 414 U.S. 338, 351-52 (1974) (holding that the Fourth Amendment exclusionary rule does not apply to grand jury proceedings); *Blair v. United States*, 250 U.S. 273, 282 (1919) (holding that a subpoenaed grand jury witness had no standing to challenge the investigation).

160. Beale, *supra* note 149, at 1459-60. Federal courts have sometimes categorized the grand jury as an arm of the court. *See, e.g.*, *Levine v. United States*, 362 U.S. 610, 617 (1960) ("The grand jury is an arm of the court and its *in camera* proceedings constitute 'a judicial inquiry.'"); (quoting *Hale v. Henkel*, 201 U.S. 43, 66 (1906), *overruled by* *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964)); *Brown v. United States*, 359 U.S. 41, 49 (1959) (stating that the grand jury "remains an appendage of the court"), *overruled by* *Harris v. United States*, 382 U.S. 162 (1965); *Cobbledick v. United States*, 309 U.S. 323, 327 (1940) ("The Constitution itself makes the grand jury a part of the judicial process."); *In re Grand Jury Investigation of Cuisinarts, Inc.*, 665 F.2d 24, 31 (2d Cir. 1981) ("The grand jury . . . is fundamentally an arm of the judiciary."), *cert. denied*, 460 U.S. 1068 (1983); *United States v. Campanale*, 518 F.2d 352, 366 (9th Cir. 1975) ("The grand jury is an appendage of the court."), *cert. denied*, 423 U.S. 1050 (1976); *United States v. Stevens*, 510 F.2d 1101, 1106 (5th Cir. 1975) (stating that the grand jury "is not an independent, self-contained entity . . . [But] is essentially an agency of the court . . ."); *Bursey v. United States*, 466 F.2d 1059, 1082 (9th Cir. 1972) ("A grand jury is an arm of the judiciary, rather than an appendage of the other branches of Government."); *see also* *DIAMOND*, *supra* note 2, § 1.02, at

The Court has likewise been reluctant to use its supervisory power to protect defendants who claim that they were indicted improperly. For example, in *Costello v. United States*,¹⁶¹ the Court declined to invalidate an indictment based solely on hearsay evidence.¹⁶² The Court explained that an indictment founded on hearsay evidence does not amount to constitutional error, and that the Court should not exercise its supervisory power to review the sufficiency of evidence.¹⁶³

In two recent cases the Supreme Court indicated that the exercise of supervisory power should be extremely restricted and that federal courts should play a limited role with respect to the grand jury. In *United States v. Mechanik*,¹⁶⁴ the Court held that the testimony of two law enforcement agents who testified in tandem before the grand jury¹⁶⁵ was harmless error because a petit jury ultimately found the defendants guilty.¹⁶⁶ Considering the societal costs of retrial, the Court held that the petit jury's subsequent guilty verdict was sufficient to establish probable cause to support the initial indictment.¹⁶⁷

11-12; Beale, *supra*, at 1459-60 n.183 (presenting views of grand jury as under the control of the judiciary or the executive).

The grand jury has also been categorized as a prosecutorial arm of the Executive branch of government. See, e.g., *In re Grand Jury Proceedings*, 486 F.2d 85, 90 (3d Cir. 1973) (stating that the grand jury is "for all practical purposes an investigative and prosecutorial arm of the executive branch of government"); *United States v. Cleary*, 265 F.2d 459, 461 (2d Cir.) ("Basically the grand jury is a law enforcement agency."), *cert. denied*, 360 U.S. 936 (1959); see also *supra* note 8 and accompanying text.

The grand jury has also been described as an autonomous institution, independent of both the judicial and executive branches. See, e.g., *Chanen*, 549 F.2d at 1312; see also *supra* note 191 and accompanying text.

161. 350 U.S. 359 (1956).

162. *Id.* at 363-64.

163. In *Costello*, the Court stated in broad terms that "[a]n indictment returned by a legally constituted and unbiased grand jury . . . is enough to call for trial of the charge on the merits." *Id.* at 363 (footnote omitted).

164. 475 U.S. 66 (1986).

165. *Id.* at 67. Only one witness at a time may testify before the grand jury. FED. R. CRIM. P. 6(d).

166. *Mechanik*, 475 U.S. at 73.

167. *Id.* (stating that "the societal costs of retrial after a jury verdict of guilty are far too substantial to justify setting aside the verdict simply because of an error in the earlier grand jury proceedings"). In her concurring opinion in *Mechanik*, joined by Justices Brennan and Blackmun, Justice O'Connor stated that "the analysis adopted by the Court for determining the effect of a violation of the rules governing the conduct of grand juries effectively renders those rules a dead letter, thereby seriously undermining the grand jury's traditional function of protecting the innocent from unwarranted public accusation." *Id.* (O'Connor, J., concurring). Justice O'Connor concluded that "the remedy of dismissal of the indictment is appropriate if it is established that the violation substantially influenced the grand jury's decision to indict, or if there is grave doubt as to whether it had such effect." *Id.* at 78; see also Brice, *supra* note 8, at 775 (stating that "the assumption [that a petit jury's guilty verdict is sufficient to establish probable cause to support an indictment]

Two years after *Mechanik*, the Supreme Court decided to reverse the district court's dismissal of an indictment in *Bank of Nova Scotia v. United States*.¹⁶⁸ In that case, the district court had dismissed an indictment on the grounds that the prosecutor mistreated and threatened to withdraw immunity for a defense witness in order to manipulate his testimony and also allowed an Internal Revenue Service (IRS) agent to summarize evidence improperly.¹⁶⁹ The Court held in *Bank of Nova Scotia* that "[i]n the exercise of its supervisory authority, a federal court 'may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress.'"¹⁷⁰ However, the Court stated that absent a constitutional error, a federal court could not exercise its supervisory power to dismiss an indictment unless "'it is established that the violation substantially influenced the grand jury's decision to indict,' or if there is 'grave doubt' that the decision to indict was free from the substantial influence of such violations."¹⁷¹

C. Challenging an Indictment

It is extremely difficult for a defendant to challenge an indictment on the grounds that prosecutorial misconduct tainted the grand jury's determination of probable cause.¹⁷² To obtain an evidentiary hearing because of prosecutorial misconduct, the defendant must show that "grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury."¹⁷³ It is difficult for the defendant to meet this

proves too much: if the petit jury affords the defendant adequate protection, the modern grand jury has no reason for being").

168. 487 U.S. 250, 254 (1988).

169. *Id.*

170. *Id.* (quoting *United States v. Hastings*, 461 U.S. 499, 505 (1983)).

171. *Id.* at 256 (quoting *Mechanik*, 475 U.S. at 78 (O'Connor, J., concurring)). In *Nova Scotia*, the Supreme Court found that there was no evidence to show that the prosecutor's misconduct may have "influenced substantially" or raised "grave doubt" about the grand jury's decision to indict. *Id.* at 259-64.

172. See Vaira, *supra* note 8, at 1145. The most effective means for a court to preserve grand jury procedure and discourage prosecutorial misconduct is to dismiss an indictment tainted by abuse. See Anne Poulin, *Supervision of the Grand Jury: Who Watches the Guardian?*, 68 WASH. U. L.Q. 885, 898-903 (1990) (discussing the advantages and disadvantages of dismissing indictments as a remedy for prosecutorial misconduct). The threat of dismissal is an especially effective prophylactic measure, since prosecutors are immune from tort liability under federal common law for actions taken within the scope of their duties. See *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976); see also *United States v. Roth*, 777 F.2d 1200, 1202 (7th Cir. 1985) (stating that "[g]iven the absolute immunity of prosecutors from civil damage suits, it is hard to imagine what the legal sanction for this [prosecutorial] misconduct would be unless it were dismissal of the indictment"); Anthony J. Luppino, Note, *Supplementing the Functional Test of Prosecutorial Immunity*, 34 STAN. L. REV. 487, 487-88 (1982).

173. FED. R. CRIM. P. 6(e)(3)(C)(ii).

burden for several reasons. First, the misconduct is usually discovered only after the indictment is issued because the defense attorney is excluded at all times from the grand jury room during its proceedings.¹⁷⁴ In addition, the defense is not given a full transcript of the proceedings¹⁷⁵ and can only obtain for trial those portions of the transcript relating to grand jury witnesses called to testify at trial.¹⁷⁶ Thus, the defense often must obtain its evidence of misconduct from witnesses who testified before the grand jury or from the grand jurors themselves.¹⁷⁷ Once an indictment is returned, the grand jury proceedings are accorded a presumption of regularity¹⁷⁸ that cannot be challenged on the sufficiency of the evidence.¹⁷⁹

IV. *UNITED STATES V. WILLIAMS*: A PROSECUTOR'S DUTY TO PRESENT SUBSTANTIAL EXCULPATORY EVIDENCE

In *United States v. Williams*,¹⁸⁰ the United States Supreme Court held that the federal judiciary does not have the inherent authority to require a prosecutor to disclose to a grand jury substantial exculpatory evidence in his possession.¹⁸¹ By restricting the federal courts' exercise of supervisory power, the Court prevented the judiciary from impinging upon the grand jury's dual role.¹⁸² At the same time, however, the Court has not lessened the potential threat of the executive to frustrate the grand jury's protective function, and has further insulated alleged prosecutorial misconduct before the grand jury from judicial review. But because the grand jury is an institution separate from both the executive and the judiciary, the Court has properly left the duty to preserve the integrity of the grand jury process to the discretion of Congress.

A. *The Majority Opinion: Restricting Supervisory Power*

In *Williams*, the Supreme Court reversed a decision by the United States Court of Appeals for the Tenth Circuit, and held that the federal courts have no inherent authority to create a procedural rule requiring the prosecutor to disclose substantial exculpatory evidence to the grand

174. See Poulin, *supra* note 172, at 910.

175. See *Dennis v. United States*, 384 U.S. 855, 874-75 (1966).

176. See Poulin, *supra* note 172, at 927.

177. See *id.*

178. See *Hamling v. United States*, 418 U.S. 87, 139 n.23 (1974), *superseded by statute as stated in United States v. Petrov*, 747 F.2d 824 (2d Cir. 1984), *cert. denied*, 471 U.S. 1025 (1985).

179. *United States v. Costello*, 350 U.S. 359, 363 (1956).

180. 112 S. Ct. 1735 (1992).

181. *Id.* at 1746.

182. *Id.* at 1744.

jury.¹⁸³ The majority decision was based on a finding that Williams inappropriately relied on Supreme Court precedent authorizing the federal courts to use their inherent authority to create "'procedural rules not specifically required by the Constitution or Congress.'" ¹⁸⁴ The Court concluded that the cases that had previously relied on this authority only concerned the federal courts' supervision of their own petit jury proceedings, rather than grand jury proceedings.¹⁸⁵ The Court explained that federal courts have the inherent authority to remedy misconduct that occurs before the grand jury only if such misconduct violates a rule already established by the Court and Congress,¹⁸⁶ but any authority federal courts may have to create procedural rules governing grand jury proceedings "is a very limited one."¹⁸⁷ The Court based its restriction of the inherent authority of the federal judiciary over the grand jury on the grand jury's traditional autonomy.¹⁸⁸

The Court decided that the federal judiciary's exercise of its supervisory power to require a prosecutor to disclose substantial exculpatory evidence to the grand jury was inappropriate because the grand jury is independent of the judiciary.¹⁸⁹ Looking to the structure of the United States Constitution, the Court reasoned that because the Framers provided for the grand jury in the Bill of Rights, rather than in the first three

183. *Id.* at 1746.

184. *Id.* at 1741 (quoting *United States v. Hasting*, 461 U.S. 499, 505 (1983)).

185. *Id.* (explaining that *Hastings* and the cases "that rely upon the principle it expresses, deal strictly with the courts' power to control their *own* procedures").

186. *Id.* The Court stated that a federal court's supervisory power can be used to dismiss an indictment because of misconduct before the grand jury, at least where that misconduct amounts to a violation of one of those "few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions." *Id.* (quoting *United States v. Mechanik*, 475 U.S. 66, 74 (1986) (O'Connor, J., concurring)).

The Court cites both the Federal Rules of Criminal Procedure, which states that "no person other than the jurors may be present while the grand jury is deliberating or voting," FED. R. CRIM. P. 6(e), and the relevant provisions of the United States Code that "set[] forth procedures for granting a witness immunity from prosecution," 18 U.S.C. §§ 6002-6003 (1988), "prohibit[] grand jury use of unlawfully intercepted wire or oral communications," *id.* § 2515, and "criminaliz[e] subornations of perjury." *Id.* § 1622.

187. *Williams*, 112 S. Ct. at 1744. The court stated that "any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings." *Id.* (citing *United States v. Chanen*, 549 F.2d 1306, 1313 (9th Cir), *cert. denied*, 434 U.S. 825 (1977)).

188. *Id.* at 1742.

189. *Id.* "Because the grand jury is an institution separate from the courts, over whose functioning the courts do not preside, we think it clear that, as a general matter at least, no such 'supervisory' judicial authority exists, and that the disclosure rule applied here exceeded the Tenth Circuit's authority." *Id.*

Articles of the Constitution, the grand jury is independent and "belongs to no branch of the institutional government."¹⁹⁰ Implicitly drawing upon the doctrine of separation of powers, the Court reasoned that the grand jury is an autonomous body¹⁹¹ which has historically stood between the government and the individual.¹⁹²

The Court conceded that the separation of the grand jury from the judiciary has not been absolute, but insisted that the grand jury has maintained a "functional independence."¹⁹³ The Court acknowledged that the judiciary is directly involved in the grand jury process in some ways,¹⁹⁴ but concluded that because such involvement is extremely limited¹⁹⁵ and because the grand jury wields very broad investigatory power,¹⁹⁶ the

190. *Id.*

191. *Id.* The Court observed that the grand jury "'is a constitutional fixture in its own right.'" *Id.* (quoting *Chanen*, 549 F.2d at 1312 (quoting *Nixon v. Sirica*, 487 F.2d 700, 712, n.54 (D.C. Cir. 1973))).

192. *Id.* (stating that the grand jury serves "as a kind of buffer or referee between the Government and the people").

193. *Id.* The Court recognized that the grand jury "normally operates . . . in the court-house and under judicial auspices," but insisted that this "institutional relationship" has always been "at arm's length." *Id.*

194. *Id.* The majority recognized that a judge usually assembles grand jurors and administers their oath of offices. *Id.*

195. *Id.* The Court also explained that an individual before a grand jury lacks "certain constitutional protections" otherwise accorded the defendant at trial. *Id.* at 1743. The Court stated, for instance, that the Double Jeopardy Clause of the Fifth Amendment does not prevent a grand jury from indicting an individual for a crime for which a previous grand jury did not. *Id.* (citing *Ex parte United States*, 287 U.S. 241, 250-51 (1932); *United States v. Thompson*, 251 U.S. 407, 413-15 (1920)). The Court noted that it has "suggested" that the Sixth Amendment right to counsel does not arise when an individual testifies as a grand jury witness, or is the "subject of the investigation." *Id.* (citing *FED. R. CRIM. P.* 6(d); *United States v. Mandujano*, 425 U.S. 564, 581 (1976) (plurality opinion); *In re Groban*, 352 U.S. 330, 333 (1957)). The Court stated that an indictment based on evidence procured in violation of the Fifth Amendment privilege against self-incrimination "is nevertheless valid." *Id.* (quoting *United States v. Calandra*, 414 U.S. 338, 346 (1974)); see also *United States v. Blue*, 384 U.S. 251, 255 n.3 (1966); *Lawn v. United States*, 355 U.S. 339, 348-50 (1958). The Court also pointed out that evidence obtained in violation of the Fourth Amendment and hearsay evidence are admissible in a grand jury proceeding. *Blue*, 384 U.S. at 255 n.3; see *Calandra*, 414 U.S. at 349; *Costello v. United States*, 350 U.S. 359, 76 (1956).

196. *Williams*, 112 S. Ct. at 1742. The Court cited, for instance, that the grand jury has the power to commence an investigation on the mere suspicion of criminal activity, need not identify the offense or suspects under investigation, swears its own witnesses, and conducts its proceedings in secrecy and without a presiding judge. *Id.*

The majority also found that despite the fact that a grand jury must rely upon the court to compel compliance with a grand jury subpoena for "the appearance of witnesses and the production of evidence," and that the court may quash or limit a grand jury subpoena if it infringes upon constitutional or common law rights, the grand jury is still free independently to pursue its investigation. *Id.* at 1743. The majority stated that the Court has "insisted that the grand jury remain 'free to pursue its investigations unhindered by exter-

grand jury has maintained an "operational separateness" upon which federal courts may not infringe.¹⁹⁷

The Court also rejected Williams' argument that, based on the "'common law'" of the Fifth Amendment, such a rule requiring disclosure of substantial exculpatory evidence would enhance the grand jury's ability to render an "'independent and informed'" judgment.¹⁹⁸ Drawing on English history, the Court found that a defendant has never had the right to testify before the grand jury or to have favorable evidence presented on his behalf.¹⁹⁹ To impose such a disclosure requirement on the prosecutor would run counter to grand jury procedure as established by the common law, because it would allow a defendant to "circumnavigate the system";²⁰⁰ the defendant could effectively tender a full defense by providing the prosecutor with all exculpatory evidence, thereby forcing the prosecutor to reveal it to the grand jury or risk having the indictment dismissed on appeal.²⁰¹ The Court reasoned that such a duty would pervert the traditional function of the grand jury: no longer would the grand jury assess the evidence to determine probable cause, rather, it would be forced to decide a defendant's guilt or innocence.²⁰²

The Court concluded that requiring the prosecutor to present substantial exculpatory evidence to a grand jury would violate the common law

nal influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it." *Id.* (quoting *United States v. Dionisio*, 410 U.S. 1, 17-18 (1973)).

197. *Id.* at 1743. The Court stated that "the Fifth Amendment's 'constitutional guarantee presupposes an investigative body 'acting independently of either prosecuting attorney or judge.' . . ." *Id.* (quoting *Dionisio*, 410 U.S. at 16 (quoting *Stirone v. United States*, 361 U.S. 212, 218 (1960))).

198. *Id.* at 1744 (quoting *Wood v. Georgia*, 370 U.S. 375, 390 (1962)).

199. *Id.* Citing the opinion "of an early American court, three years before the Fifth Amendment was ratified," the Court stated that "it is the grand jury's function not 'to enquire . . . upon what foundation [the charge may be] denied,' or otherwise to try the suspects defenses, but only to examine 'upon what foundation [the charge] is made' by the prosecutor." *Id.* (citing *Respublica v. Shaffer*, 1 U.S. (1 Dall.) 236 (1788) (alterations in original)).

200. *Id.* at 1745.

201. *Id.* The Court stated:

Imposing upon the prosecutor a legal obligation to present exculpatory evidence in his possession would be incompatible with this [grand jury] system. If a "balanced" assessment of the entire matter is the objective, surely the first thing to be done—rather than requiring the prosecutor to say what he knows in defense of the target of the investigation—is to entitle the target to tender his own defense. To require the former while denying (as we do) the latter would be quite absurd.

Id.

202. *Id.* at 1744 (stating that "requiring the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body").

principle that the defendant has never had the right to challenge the sufficiency of the evidence upon which a grand jury returned a true bill.²⁰³ Rejecting Williams' argument that a disclosure requirement would "save valuable judicial time,"²⁰⁴ the Court reasoned that the process of reviewing motions challenging indictments as unjustified is also time-consuming, and may yield no net benefit.²⁰⁵ The majority concluded that only Congress has the power to impose a prosecutorial disclosure requirement.²⁰⁶

B. Justice Stevens' Dissent: Preventing Prosecutorial Misconduct

In dissent, Justice Stevens explicitly rejected the majority's strict separation of powers analysis and concluded that the federal judiciary has ample inherent authority to impose, on its own initiative, a prosecutorial duty to disclose substantial exculpatory evidence to a grand jury.²⁰⁷ Justice Stevens emphasized that a prosecutor assumes a special role²⁰⁸ before a grand jury and may seriously abuse such authority.²⁰⁹ Interpreting Supreme Court precedent, in particular *Bank of Nova Scotia v. United*

203. *Id.* The Court noted that "[m]otions to quash indictments based upon the sufficiency of the evidence relied upon by the grand jury were unheard of at common law in England." *Id.* at 1745 (citation omitted). In looking to American history, the Court quoted Justice Nelson riding Circuit in 1852:

"No case has been cited, nor have we been able to find any, furnishing an authority for looking into and revising the judgment of the grand jury upon the evidence, for the purpose of determining whether or not the finding was founded upon sufficient proof, or whether there was a deficiency in respect to any part of the complaint"

Id. (quoting *United States v. Reed*, 27 F. Cas. 727, 738 (C.C.N.D.N.Y. 1852) (No. 16,134)).

In *Costello v. United States*, 350 U.S. 359 (1956), the Court wrote:

If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed An indictment returned by a legally constituted and unbiased grand jury, . . . if valid on its face, is enough to call for trial of the charges on the merits. The Fifth Amendment requires nothing more.

Id. at 363 (footnote omitted); see also *Holt v. United States*, 218 U.S. 245, 248 (1910).

204. *Williams*, 112 S. Ct. at 1746.

205. *Id.*

206. *Id.*

207. *Id.* at 1751-52 (Stevens, J., dissenting).

208. *Id.* at 1750-51 (emphasizing that a prosecutor's role as a "grand jury adviser. . . . [M]ust take precedence" over his duties as an advocate since he is a representative of the United States government).

209. *Id.* at 1749-50. Justice Stevens catalogued the sorts of abusive "tactics" that an "overzealous" prosecutor may utilize. *Id.* at 1749. Justice Stevens stated that in grand jury proceedings in particular, prosecutors have presented perjured testimony, examined witnesses outside the presence of the grand jury and then did not reveal such exculpatory evidence to the jurors, did not advise the grand jury of its power to subpoena witnesses, and misstated the law and facts. *Id.* at 1749-50.

States,²¹⁰ Justice Stevens concluded that the federal courts do have the supervisory power to dismiss an indictment because of prosecutorial misconduct.²¹¹

Unlike the majority, Justice Stevens found that the federal judiciary's imposition of a prosecutorial disclosure rule was an appropriate exercise of supervisory power, because the grand jury is not wholly autonomous, but rather falls within the purview of the federal courts.²¹² Justice Stevens explained that regardless of whether the grand jury is "'textually assigned'"²¹³ by the Constitution to any one of the three branches of government, the grand jury is subject to judicial control "[t]hroughout its life."²¹⁴ Unlike the majority, Justice Stevens found it critical that the grand jury is "'powerless'"²¹⁵ to fulfill its investigatory role without court intervention.²¹⁶

Justice Stevens pointed out, moreover, that the majority readily admitted that the grand jury is subject to the direct control of both Congress and the federal judiciary. In addition to stating that Congress "'is free to prescribe'"²¹⁷ a prosecutorial disclosure rule, the majority conceded that

210. 487 U.S. 250 (1988).

211. *Williams*, 112 S. Ct. at 1751. Unlike the majority, Justice Stevens interpreted Court precedent, particularly *Bank of Nova Scotia* and *United States v. Mechanik*, 475 U.S. 66 (1986), to mean that in order to dismiss an indictment on the basis of prosecutorial misconduct a court need not find that a prosecutor violated a particular rule. *Williams*, 112 S. Ct. at 1752. According to Justice Stevens, dismissal is warranted where a court finds that prosecutorial misconduct "played a critical role in persuading the jury to return the indictment," regardless of whether there is a pre-existing rule specifically barring such misconduct. *Id.* at 1752-53.

Justice Stevens stated that "[u]nrestrained prosecutorial misconduct in grand jury proceedings is inconsistent with the administration of justice in the federal courts and should be redressed in appropriate cases by the dismissal of indictments obtained by improper methods." *Id.* at 1753.

212. *Id.* at 1752.

213. *Id.* (stating that "[a]lthough the grand jury has not been 'textually assigned' to 'any of the branches described in the first three Articles' of the Constitution, it is not an autonomous body completely beyond the reach of the other branches" (quoting *id.* at 1742 (majority opinion))).

214. *Id.* (stating that "from the moment it is convened until it is discharged, the grand jury is subject to the control of the court").

215. *Id.* (quoting *Brown v. United States*, 359 U.S. 41, 49 (1959), *overruled by Morris v. United States*, 382 U.S. 162 (1965)).

216. *Id.* Justice Stevens stated:

"A grand jury is clothed with great independence in many areas, but it remains an appendage of the court, powerless to perform its investigative function without the court's aid, because powerless itself to compel the testimony of witnesses. It is the court's process which summons the witness to attend and give testimony, and it is the court which must compel a witness to testify if, after appearing, he refuses to do so."

Id. (quoting *Brown*, 359 U.S. at 49).

217. *Id.* at 1752 n.10.

federal courts have the power to modify or quash a grand jury subpoena that violates “the Constitution, statutes, or the common law.”²¹⁸ Justice Stevens concluded, therefore, that the grand jury enjoys wide discretion in executing its investigatory powers, not because the federal judiciary lacks the power to impose rules, but simply because it has declined to do so.²¹⁹

Justice Stevens also rejected the majority’s conclusion that the imposition of a prosecutorial disclosure rule would “alter” the grand jury’s historical function, transforming it from an accusatory to an adjudicatory body.²²⁰ Emphasizing the protective function of the grand jury²²¹ and the *ex parte* nature²²² of its proceedings, the dissent recognized the strong need for a prosecutorial disclosure rule to preserve the integrity²²³ of the grand jury and to protect it from prosecutorial abuse.²²⁴

Justice Stevens agreed with the majority that to require a prosecutor to present all exculpatory evidence to the grand jury would be burdensome for the prosecutor and would be “inconsistent” with the grand jury’s function.²²⁵ The dissent, however, maintained that to permit a prosecutor to withhold evidence that would otherwise preclude a finding of probable cause by the grand jury undermines the constitutional function of the grand jury.²²⁶

218. *Id.* at 1752 (quoting *United States v. Calandra*, 414 U.S. 338, 346 (1974)).

219. *Id.* Justice Stevens stated that the grand jury investigatory power “is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials.’ . . . [B]ecause Congress and the Court have generally thought it best not to impose procedural restraints on the grand jury; . . . not because they lack all power to do so.” *Id.* (quoting *Calandra*, 414 U.S. at 343).

220. *Id.* at 1753.

221. *Id.* “After all, the grand jury is not merely an investigatory body; it also serves as a ‘protector of citizens against arbitrary and oppressive governmental action.’” *Id.* (quoting *Calandra*, 414 U.S. at 343).

222. *Id.* at 1750 (stating that when before a grand jury, “the prosecutor operates without the check of a judge or a trained legal adversary, and virtually immune from public scrutiny”) (quoting *United States v. Serbo*, 604 F.2d 807, 817 (3d Cir. 1979)).

223. *Id.* at 1753. Justice Stevens stated that “[w]e do not protect the integrity and independence of the grand jury by closing our eyes to the countless forms of prosecutorial misconduct that may occur inside the secrecy of the grand jury room.” *Id.*

224. *Id.* “It blinks reality to say that the grand jury can adequately perform this important [protective] role if it is intentionally misled by the prosecutor—on whose knowledge of the law and facts of the underlying criminal investigation the jurors will, of necessity, rely.” *Id.*

225. *Id.* at 1753-54.

226. *Id.*

V. PRESERVING THE AUTONOMY AND FUNCTION OF THE GRAND JURY

The key issue in *Williams* was the proper scope of the federal courts' supervisory power over the grand jury. While both the majority and dissent agreed that federal courts may, in appropriate circumstances, invoke their inherent power to oversee judicial proceedings, the Court divided as to the appropriateness of exercising such power to regulate grand jury procedure. Exercising a philosophy of judicial self-restraint, the majority adopted the better rule.

For the majority, the resolution of the issue was dictated by the lesson of history²²⁷ and Supreme Court precedent. The majority was correct to accord great weight to the fact that the grand jury is separate from and fundamentally different than the judiciary. To allow the federal courts to fashion a prosecutorial disclosure rule would have had serious negative consequences on this traditional separation. First, such a rule would have threatened the traditionally ex parte and secret nature of grand jury proceedings by requiring the prosecutor to tender a defense for the accused,²²⁸ as well as by exposing both the prosecutor's evidentiary presentation and grand jury proceedings to searching court review. Second, allowing the federal courts to impose such a rule would impinge upon the executive's own exercise of power and discretion by dictating what evidence the prosecutor must present to a grand jury.²²⁹ Third, permitting

227. Looking to both English and American history, the majority found no justification for imposing such a disclosure requirement. First, the defendant has never had the right to present his side of the case to a grand jury. *Id.* at 1745 (majority opinion); *see also supra* note 16. Second, the prosecutor has never had a duty to present exculpatory evidence to a grand jury. *Williams*, 112 S. Ct. at 1744; *see also supra* note 16. Third, the grand jury was never obligated to consider exculpatory evidence. *Williams*, 112 S. Ct. at 1745. The Court posited:

The authority of the prosecutor to seek an indictment has long been understood to be "coterminous with the authority of the grand jury to entertain [the prosecutor's] charges." If the grand jury has no obligation to consider all "substantial exculpatory" evidence, we do not understand how the prosecutor can be said to have a binding obligation to present it.

Id. (quoting *United States v. Thompson*, 251 U.S. 407, 414 (1920)); *see also supra* note 15. And lastly, an indictment has never been successfully challenged on the quantity or quality of evidence supporting it. *Williams*, 112 S. Ct. at 1745 ("Motions to quash indictments based upon the sufficiency of the evidence relied upon by the grand jury were unheard of at common law in England." (citation omitted)); *see also supra* note 196.

228. *See supra* note 110 and accompanying text.

229. *United States v. Chanen*, 549 F.2d 1306, 1312-13 (9th Cir.) (stating that "initiating a criminal case by presenting evidence before the grand jury—qualifies as 'an executive function within the exclusive prerogative of the Attorney General'" (quoting *In re Persico*, 522 F.2d 41, 54-55 (2d Cir. 1975))), *cert. denied*, 434 U.S. 825 (1977).

The *Chanen* court also stated that:

the federal courts to make such an assertion of power would lay dangerous precedent for future judicial encroachment upon the role of the grand jury.

By making such a strict, albeit correct, reading of history, however, the Court failed to address the fact that modern exigencies have shifted the balance of power in the grand jury room and have allowed the prosecutor to assume a position of unprecedented influence.²³⁰ In light of the ex parte and secret nature of grand jury proceedings,²³¹ there is a tremendous potential for the prosecutor to abuse the grand jury.²³² The dissent addressed this issue head-on when it highlighted the special role a prosecutor serves²³³ and then identified the many types of prosecutorial misconduct that may occur before the grand jury.²³⁴

While the dissent clearly identified the problem of prosecutorial abuse of the grand jury and its debilitating effect on the grand jury's protective capacity,²³⁵ Justice Stevens overstated the federal courts' inherent power to fashion a procedural remedy.²³⁶ The dissent reasoned, in effect, that two wrongs make a right: if the executive impinges upon the independence of the grand jury, then it is justifiable for the judiciary to do so in response.²³⁷ Although this theory of checks and balances is authorized, and is necessary, to maintain the balance of power between the judiciary, the executive, and Congress, the doctrine does not apply as readily to the relationship between the judiciary, the executive, and the grand jury. The federal courts' exercise of their inherent power must be restricted in light of the fact the grand jury was intended to be autonomous, free of both executive *and* judicial interference.

"An attorney for the United States, as any other attorney, however, appears in a dual role. He is at once an officer of the court and the agent and attorney for a client; in the first capacity he is responsible to the Court for the manner of his conduct of a case, *i.e.*, his demeanor, deportment and ethical conduct; but in his second capacity, as agent and attorney for the Executive, he is responsible to his principal and the courts have no power over the exercise of his discretion or his motives as they relate to the execution of his duty within the framework of his professional employment."

Id. at 1313 n.5 (quoting *Newman v. United States*, 382 F.2d 479, 481 (D.C. Cir. 1967)).

230. *See supra* notes 124-42 and accompanying text.

231. *See supra* notes 117, 123 and accompanying text.

232. *See supra* notes 124-42 and accompanying text.

233. *Williams v. United States*, 112 S. Ct. 1735, 1750 (1992) (Stevens, J., dissenting); *see also supra* notes 112-16, 207 and accompanying text.

234. *Williams*, 112 S. Ct. at 1749-50; *see also supra* note 208 and accompanying text.

235. *Williams*, 112 S. Ct. at 1749-50; *see supra* notes 207-08 and accompanying text; *see also supra* notes 125-47 and accompanying text.

236. *Williams*, 112 S. Ct. at 1751, 1754.

237. *Id.*

In an effort to prevent judicial encroachment upon the grand jury by narrowly construing the federal courts' supervisory power, the majority focused its attention on the grand jury's accusatory role, and permitted the executive to potentially threaten the grand jury's protective function. Given the constitutionally-mandated independence of the grand jury from the control of both the executive and the judiciary, it is proper for Congress to decide whether to regulate the internal procedure of the grand jury. If the Congress enacted such procedural regulations, the federal judiciary could then act within the appropriate scope of its inherent authority to interpret and preserve the explicit intent of Congress.

VI. CONCLUSION

If the Fifth Amendment right to a grand jury indictment is to provide any protection to an accused, it must, at a minimum, ensure that the grand jury is prepared to make an informed and impartial determination of probable cause. By restricting the federal courts' supervisory power and denying the courts the authority to impose a prosecutorial disclosure rule, the *Williams* Court has properly acknowledged that the federal judiciary does not have the same degree of control over grand jury proceedings as it does over its own judicial proceedings. Thus, given the tripartite nature of grand jury proceedings, as the grand jury becomes more dependant upon the prosecutor, and the prosecutor's power increases as a result, Congress may have to act to maintain the integrity and autonomy of the grand jury, and prevent the grand jury from once again becoming, like the Assize of Clarendon, an arm of the executive.

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